Supreme Court, U.S.
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In The

Supreme Court of the United States

SAFARRI AVIATION, INC., d/b/a
SAFARRI HELICOPTER TOURS,

Petitioner,

v.

C. BLAKEY, Administrator,
AVIATION ADMINISTRATION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Respondent FAA's repetitive and cumulative evasions and violations of the Administrative Procedure Act's substantive and procedural rulemaking mandates in promulgating Special Federal Aviation Regulation 71 (SFAR 71) improperly denied Petitioner SAFARI AVIATION lawful participation in this rulemaking and/or resulted in the imposition of arbitrary, capricious, unlawful and dangerous airspace regulations.

2. Whether Respondent FAA's claimed innovation of the "interpretive rule" exceeded 5 U.S.C. § 553(b)(3)(A)'s exemption from the APA's notice and comment by amending SFAR 71 to change existing policy affecting individual rights and obligations and thus created a *de facto* legislative rule.

CORPORATE DISCLOSURE STATEMENT

SAFARI AVIATION, INC. is a privately-held Hawaii corporation with its principle places of business in Hawaii based at Lihue, Kauai and Hilo, Hawaii; SAFARI AVIATION, INC. provides mobile operations (for U.S. Forest Service fire-fighting operations) in the State of Idaho.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals has issued and published two opinions in the course of Petitioner SAFARI AVIATION's nine year challenge to Hawaii-specific Special Federal Aviation Regulation 71 ("SFAR 71"), which regulation is set forth in Appendix (hereinafter "App.") D. The Ninth Circuit's most recent opinion, *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144 (9th Cir. 2002), relates to the 1997 and 2000 promulgations of SFAR 71; that opinion is reproduced as App. A. The opinion arising out of the original 1994 industry-wide challenge to the emergency promulgation of SFAR 71 resulted in a published opinion by the Ninth Circuit Court of Appeals in *Hawaii Helicopter Operators Association v. Federal Aviation Administration*, (hereinafter "*HHOA v. FAA*", 51 F.3d 212 (9th Cir. 1995) (hereinafter "*HHOA* Opinion"); that prior opinion is reproduced as App. B.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Ninth Circuit, *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144 (9th Cir. 2002), was entered on 26 August 2002. App. A. Petitioner SAFARI filed a timely Petition for Rehearing en banc and Petition for Rehearing, which were denied by order entered 5 November 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

REGULATORY PROVISIONS INVOLVED

SPECIAL FEDERAL AVIATION REGULATION 71
("SFAR 71"), (14 C.F.R Parts 91 & 135)
Reproduced in Full as Appendix D.

STATEMENT OF THE CASE

Petitioner SAFARI AVIATION, INC. dba SAFARI HELICOPTER TOURS (hereinafter "SAFARI") is an aeronautical entity which operates both helicopters and fixed wing aircraft within the State of Hawaii as an on-demand Air Taxi Commercial Operator (hereinafter "ATCO" or "air taxi") pursuant to the authority ("Certificate") granted by Respondent FAA Administrator BLAKEY[1] pursuant to the provisions of 14 C.F.R. Part 135 (hereinafter "Part 135"). SAFARI seeks judicial review of the lengthy and consolidated rulemaking proceedings conducted under the single agency Docket No. 27919 which commenced on 22 September 1994 when Respondent FAA published Special Federal Aviation Regulation No. 71 (hereinafter "SFAR 71") as an "emergency final rule", 59 Fed. Reg. 49,138-49,146), effective 26 October

[1] The current Administrator of the Federal Aviation Administration, Hon. Marion C. Blakey, has been substituted, pursuant to Rule 35-3 of the Rules of The Supreme Court of the United States, for former Respondent Administrator Jane F. Garvey. Hon. Jane F. Garvey herself replaced former Administrator Mr. David R. Hinson, who promulgated the original (and identical) Special Federal Air Regulation No. 71 on September 22, 1994 as a final rule without providing notice or seeking comments. Respondent Blakey will be identified as "Respondent FAA" or the "ADMINISTRATOR".

1994, what the Administrator knew would be a highly-contested and controversial new aeronautical regulation imposed solely on aerial tour operations within the State of Hawaii.

SAFARI's primary flight activity consists of aerial tours with state-of-the-art turbine-powered helicopters over the Islands of Kauai and Hawaii (Big Island). SAFARI operates pursuant to an FAA-promulgated and very comprehensive uniform national regulatory structure adopted in APA-compliant rulemaking proceedings; during the last sixty-five years rules governing certification of pilots and instructors (14 C.F.R. Part 61), general operating and flight rules (14 C.F.R. Part 91), and commuter and on-demand commercial operations (14 C.F.R. Part 135) have been promulgated. Both the FAA and the U.S. Department of Transportation processed and reviewed SAFARI's fitness pursuant to the provisions of 14 C.F.R. Part 119, in addition to insuring its compliance with 14 C.F.R. Part 135 prior to issuing the ATCO Certificate.

The imposition of SFAR 71 on SAFARI subjected its daily operations to hazardous conditions and financial hardship, including an increased risk of catastrophic loss of life of both crew and passengers due to the mandates of Section 6 of SFAR 71. Section 6 imposes altitude and stand-off requirements:

> Section 6. Minimum flight altitudes. Except when necessary for takeoff and landing, or operating in compliance with an air traffic control clearance, or as otherwise authorized by the Administrator, no person may conduct an air tour in Hawaii:

(a) Below an altitude of 1,500 feet above the surface over all areas of the State of Hawaii, and,

(b) Closer than 1,500 feet to any person or property; or,

(c) Below any altitude prescribed by federal statute or regulation.

App. D 3-4.

This restriction can be partially portrayed as a 1,500 foot radius virtual hemisphere below and surrounding the helicopter which the pilot and operators must insure is not pierced by any land or structure during the flight for purely regulatory reasons. As documented in the approximate 10,000 page Record[2] maintained by Respondent FAA, this single-state regulation was imposed following years of anti-helicopter primarily by environmental interests, supported by Hawaii Congresswoman Mink and others, resulting in FAA-sponsored studies recommending an SFAR for Hawaii.

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[2] The Administrator's record contains no page numbers, and most pages are not date-stamped; it is impossible to refer to any single document. It is also impossible to verify when and how comments and other documents were logged. As discussed below, the FAA lost some comments for still unexplained reasons during the 2000 renewal of SFAR 72, and failed to review others. Petitioner SAFARI utilized approximately 600 pages of excerpts in the court below. It is arguable that this would give rise to jurisdiction to the district court to consider wide-ranging constitutional challenges to the adequacy of the record-keeping process. *City of Los Angeles v. F.A.A.*, 239 F.3d 1033, 1034 (9th Cir. 2001); *City of Alameda v. F.A.A.*, 285 F.3d 1143 (9th Cir. 2002), *Pet. Cert. Filed*, 71 USLW 3416 (Dec. 6, 2002) (No. 02-856).

The "Bubble" requirement of SFAR 71 was immediately recognized by all interests as a noise abatement regulation, both directly and due to its effect on making far more days "unflyable" due to the real world topography and meteorology of the Aloha State. It also, as expected, made helicopter tours less desirable for the consumer and more costly for the operator, which reduced flights and eventually reduced the number of operators through attrition. It was also part of a regulatory two-step by which the FAA has self-exempted virtually all of its real-world regulation of tour helicopters from APA compliance and empowered itself to avoid judicial review in the process.

SAFARI and others, threatened with financial exsanguination, were and are being denied their rightful participation in the promulgation of rules which both increased risks to safety in aviation through a variety of factors, thus negating any safety justification,[3] and made regulatory sense only as an ineffective noise abatement regulation. This litigation arises out of Respondent FAA's continued refusal to respond with a technical (agency expertise) rather than a legal (agency counsel) analysis of the extensive critical comments (including those of the National Transportation Safety Board or "NTSB") or to amend the concededly hazardous attributes of Section 6 of SFAR 71. SAFARI maintains both that the FAA's expertise has not been utilized, and that the continued

[3] These requirements also increased rather than decreased the noise impact of tour helicopter operations, as a higher flight path increased the spread of the noise footprint of the helicopter over a much wider area, and prevent the noise energy from being attenuated by tropical foliage.

imposition of SFAR 71 constitutes a daily peril to safety in aviation for *all* airspace users in Hawaii.[4]

Respondent FAA, following the decision of the Ninth Circuit Court of Appeals on March 29, 1994, *HHOA v. FAA*, App. B, rejecting an industry-wide challenge to its self-serving declaration of an "emergency", avoided further judicial review. SFAR 71 was subsequently re-promulgated identified as an "interim rule", again without providing a Notice of Proposed Rule Making or "NPRM") on 26 October 1997 (62 Fed. Reg. 58,854-58,859) and subsequently a third time via a NPRM issued on 21 August 2000 (65 Fed. Reg. 51,512-51,514) and a final rule issued on 26 September 2000 (65 Fed. Reg. 58,610-51,612).

SAFARI's turbine-powered helicopters, while often a full order of magnitude more expensive to operate than many other elderly fixed-wing tour aircraft, allowed significant airspace operational advantages within Respondent FAA detailed national regulatory framework, in addition to substantially increasing safety, reliability and the "Aloha" experience of the tour. The FAA, recognizing the specific attributes of helicopter operations, provides substantially different operational rules, in large part to separate different types of aircraft altitude. SFAR 71

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[4] SAFARI nearly lost a helicopter and all seven on board on 25 October 1995 in a nearly catastrophic imminent head-on midair collision near Volcano, Hawaii. SAFARI's Supplemental Excerpt of Record below, at 27-31, are digital frames captured from the on-board digital camera at .5 second intervals. At the 300 knot closing speed, SAFARI's pilot had less than two seconds (four pictures or 60 video frames) to recognize the traffic and conduct a violent evasive maneuver; SAFARI's aircraft missed the descending high-speed fixed-wing twin by less than 50 feet.

contradicted all prior airspace regulatory theory by doing the opposite; it concentrated aircraft at one altitude near the bases of clouds at scenic locations where aircraft concentrate.[5]

14 C.F.R. Part 135 requires air taxi helicopters to operate no lower than 300 feet AGL (above ground level) in congested areas, 14 C.F.R. § 135.203(b), but the pilot must also maintain a visual surface reference " . . . sufficient to safely control the helicopter". 14 C.F.R. § 135.207. Outside of congested or restricted airspace helicopters operating less 1200 feet AGL (generally Class G airspace) are allowed to operate "clear of clouds", but only if " . . . operated at a speed that allows the pilot adequate opportunity to see any air traffic or obstruction in time to avoid a collision." 91 C.F.R. § 91.155(b)(1). If the helicopter is operating as a Part 135 flight below 1200 feet AGL, the "clear of clouds" visibility requirement increases to 1/2 mile daytime and one mile at night. 14 C.F.R. § 135.205(b). Non air taxi helicopters may operate at *any* altitude " . . . if the operation is conducted without hazard to persons or property on the surface." 14 C.F.R. § 91.119(d). All fixed-wing aircraft and helicopters are required, 14 C.F.R. § 91.155(a), to generally maintain 3

[5] Because many tour routes cross from valley floors over the adjacent ridge (known as a *pali*), flights which are perfectly safe and legal in the other 49 states cannot be completed in Hawaii purely for regulatory reasons. With cumulus cloud bases at 2500 AGL (normal good weather), any *pali* higher than 500 feet will force a detour or abandonment of the tour, despite unrestricted horizontal visibility and an order of magnitude more vertical clearance from ground/cloud bases (2000 feet total) than is FAA-acceptable in all other states. In addition, the horizontal stand-off required from *palis* on both sides of the route concentrated traffic in the center of valleys at the same altitude.

mile visibility and at least 500 feet below, 1000 feet above and 2000 feet horizontal standoff distance from any clouds when operating above 1200 feet AGL.

This soon to be repeated rulemaking process[6] has resulted in regulatory process reduced to a word-processing exercise, allowing Respondent FAA arbitrary and judicially unreviewable discretion to authorize operators to avoid financial disaster only if they accede to the Administrator's use of processed "interpretive rules" amending SFAR 71 to change existing policy affecting individual rights and obligations and thus creating a *de facto* legislative rule. The FAA may not exercise plenary substantive and procedural authority over all operations conducted pursuant to the so-called "deviation" authority granted by the Administrator as a license or authorization based upon a *sub rosa* set of non-APA regulations.

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[6] The Ninth Circuit Court of Appeals below recognized the FAA stated intent to replace SFAR 71 with a national air tour rule "in the near future", quoting the FAA's 26 September 2000 claim "'. . . that the forthcoming national tour rule would soon replace SFAR 71'" and that SFAR 71 only remains in effect until October 2003. App. A-7. No NPRM has been filed proposing any national rule or further extension of SFAR 71.

REASONS FOR GRANTING THE PETITION

I. THE TWO CIRCUIT DECISIONS DENYING SAFARI ANY RELIEF CONFLICT WITH THE MINIMAL STATUTORY RULEMAKING REQUIREMENTS DICTATED BY THIS COURT AND OTHER CIRCUITS.

A. Respondent FAA Has Refused To Consider And/Or Respond To Extensive Relevant And Critical Comments Provided By Knowledgeable Individuals During Or Following Its Emergency Promulgation Of SFAR 71.

Respondent FAA's sole regulatory response to the massive and detailed safety criticisms of SFAR 71, prepared more than three years after the emergency promulgation, was:

> One of the most contentious aspects of the SFAR for operators was the minimum operating altitude. The FAA, after working closely with air tour operators, believes that *this problem has been somewhat mitigated.* Since 1994, the FAA has allowed deviations from SFAR 71 for the majority of air tour operators. Air tour operators of fixed wing aircraft have been granted deviations to conduct air tours at a minimum altitude of 1,000 feet; air tour operators of single-engine helicopters have been granted deviations to conduct air tours at a minimum of 500 feet. *The use of deviations has provided separation between the fixed-wing aircraft and helicopters around the scenic areas where the traffic is the most dense.*

62 Fed. Reg. at 58,857 (1997). What this response concealed is that the ink was not even dry on the "deviations", which were granted only that same day and could be

revoked by the Administrator at any time. As is discussed below, this abuse of the allowable scope of "interpretive rules" approved by the Ninth Circuit has allowed the averred interpretive rules to engulf the legislative rules they purport to apply.

The fallacy of this response, as discussed below, is that the FAA intends to withhold and/or revoke these deviations as sanctions for SFAR violations, thus re-creating the lack of separation for those who need it the most. This response also indicates the lack of APA-mandated adequate response and the abuse of the "interpretive rule" exemption. 5 U.S.C. § 553(b)(3)(A). All historical FAA airspace regulation utilized APA-compliant rulemaking for such substantive rules rather than the hybrid "interpretive rule/deviation authority" surrogate the FAA utilized to empower itself to avoid the hardships a democratic society places on governmental action by the APA. *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989):

> The FAA rulemaking detours and lack of response to comments can only be due to the genesis of this rule as of at least mixed purpose. By early 1994, it was apparent that political forces in Hawaii, including the late Congresswoman Patsy T. Mink, might succeed in inducing Respondent FAA to commence a rulemaking proceeding regarding tour helicopters and scenic area overflights; these interests had an absolute right to do so. The FAA was close to commencing proceedings by proper NPRM procedures in June

1994,[7] but two well-reported helicopter accidents on 14 July 1994 provided FAA counsel with the "emergency" it needed to avoid what it knew would be a contentious proceeding. Following an FAA official's announcement to Congress in July 1994 that the FAA would issue an SFAR for Hawaii, officials and operators from the Hawaii Helicopter Operators Association ("HHOA") officials unsuccessfully attempted to meet with

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[7] See App. E, consisting of a draft Hawaii-specific Air Tour regulation dated 6 June 1994, and the contents therein. The goal of this regulation was to require all tour operators to become ATCO's, and then to impose altitude and other restrictions via what are known as "Operational Specifications" or OpSecs, issued by the Administrator pursuant to 14 C.F.R. § 119.51. The purposes of this was to require all tour aircraft to " . . . operate under special operating procedure designed to enhance safety and noise abatement.", App. E-1, and invited comments, *inter alia*, relating to the "environmental . . . impact . . . " of the proposal. App. E-2.

The draft proposal then references complaints about "overflight operations" and "noise", and goes on to document Rep. Mink's legislative efforts (H.R. 1696-103 Congress) to regulate airspace for environmental goals. App. E-5. Two of the three goals sought by the FAA proposal related to noise impacts, which its past efforts (along with the HHOA) to resolve involved encouraging "fly neighborly" operations. App. E-6. The discussion then referred to prior FAA meetings to discuss purely environmental impacts, App. E-6, addressed only noise abatement under the "General Issues" heading, App. E-14-15, and then asserted the power to protect "environmental values on the surface. . . . " App. E-15-16. This proposal became SFAR 71, but with all of the environmental language omitted and further discussion of safety added.

While SAFARI has not raised any NEPA issues herein, it should be noted that aerial tours may be the most environmentally friendly method of viewing National Parks and scenic areas. **Comment:** SCENIC AIR TOURS OVER OUR NATIONAL PARKS: EXPLOITATION OF OUR NATIONAL RESOURCES OR ENVIRONMENTAL SOLUTION? 62 J. Air L. & Com.

> Respondent FAA or obtain a draft of the proposed SFAR. What became SFAR 71 was a legally-cleansed version of the draft NPRM.

App. E.

These pre-promulgation efforts at regulatory input were completely rebuffed by the FAA. The FAA may have reduced the APA democratic protections as part of official government policy to "push the envelope" in streamlining rulemaking. In 1993, the Clinton administration's National Performance Review (NPR) suggested that agencies experiment with direct final rulemaking.[8] This process, dubbed "ossification",[9] was utilized by Respondent FAA in the initial promulgation and subsequent re-promulgations of SFAR 71 as a device to avoid both the APA's statutory requirements and judicial review.

This Court need only review the substantial and critical comments contained in Chairman Hall's 27 October 1994 letter (App. F) documenting the Safety Board's post-promulgation review of SFAR 71 to conclude the FAA had created a dangerous operational environment and has now answers (other than noise abatement goals) for its Section 6 of SFAR 71. NTSB Chairman Hall cautioned:

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[8] See Office of the Vice President, Accompanying Report of the National Performance Review: Improving Regulatory Systems 42-44 (1993).

[9] See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 Tex. L. Rev. 483 (1997); Paul R. Verkuil, *Rulemaking Ossification – A Modest Proposal*, 47 Admin. L. Rev. 453 (1995).

> However, the safety Board believes that the SFAR 71 provision that, "no person may conduct an air tour in Hawaii below an altitude of 1,500 feet above the surface of State of Hawaii or closer that (sic) 1,500 feet to any person or property (or as authorized by the Administrator), *may* present midair collision hazards or encounters with cloud layers that are more serious than the hazards of flights at lower altitudes.

App. F-4. Chairman Hall noted that it was "obvious" that Section 6 would concentrate air tour traffic at that altitude, and critically observed:

> Furthermore, weather patterns around the Hawaiian islands should be a major factor in setting any minimum altitude for air tour operations. The orographic effect of changing windward and leeward air flow produces cloud formations along tour routes that must be considered when defining altitude requirements.

App. F-5. Chairman Hall reiterated:

> The Safety Board believes that it is imperative that the FAA conduct further discussions with the interested parties in Hawaii to resolve the issue of optimum flight altitudes for air tour operators and, at the same time, consider the negative effects of such restrictions that may result in unintended degradation of the existing level of safety.

App. F-5.

Judicial review of rulemaking requires a searching review of rulemaking records (if they exist) and the substantive merits of agency decisions, asking whether regulatory officials had taken a "hard look" at all of the

issues and data. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) ("searching and careful inquiry"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 46-57 (1983); *National Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980); *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31, 35-41 (D.C. Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973). The APA's arbitrary and capricious standard of review provided a mechanism for invalidating rules that judges regard as understudied or ill-conceived, even assuming their promulgation was procedurally beyond reproach.

The FAA's sole reliance on an "engine power loss" argument[10] as being the predominant accident scenario, without considering the comments of Chairman Hall and others concerning other accident scenarios, is a major defect. Safety in aviation is rarely as simple as one accident scenario. The FAA ignored SFAR 71's impact on traffic concentration, weather-induced "white-out", continued flight into terrain (CFIT), pilot human factors and adverse regulatory attitude, among others. No valid reason existed for the secrecy, then or now, and it would have been far more sensible for the FAA to at least have

[10] The Administrator's continued repetition of the so-called "engine loss scenario" and failure to discuss other accident modes reveals that the FAA did not consider all aspects of aviation safety. The FAA has multiple sources of accurate information on accidents other than final NTSB reports, yet avoided discussing two fatal accidents claiming 13 lives (now with judicial approval) knowing that neither involved an engine failure. 65 Fed Reg. 58611. If it was not "premature" to discuss (without NTSB reports) all the other accidents it relied upon to justify SFAR 71's renewal, it was not premature to discuss.

allowed access to the draft documents if in fact SFAR 71 did not from its inception discuss environmental and noise issue *ala* the Mink NPRM.

It is impossible from the FAA responses for this Court to determine which comments were "not relevant", "speculative" or "mooted by subsequent events" as claimed; it is also impossible to determine what safety concerns were identified and supposedly resolved. Nor is it possible to discern how the FAA will treat those operators who don't receive deviations or have them revoked. A near presumption exists that both agency review and judicial review of emergency promulgations must be more exacting, which the lower court failed to perform. *American Mining Congress v. MSHA*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (observing that "any agency statement not subjected to notice-and-comment rulemaking will be more vulnerable to attack"). Respondent FAA must be presumed that its paper trail of rulemaking may eventually result in more critical review. *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (noting that rulemaking "'assur[es] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions'"); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978) (explaining that notice-and-comment procedures "maximize the susceptibility of the record to judicial magazine"). The Administrator's continued refusal to respond to safety comments should result in adverse inferences respecting whether it is merely refusing to concede either its initial mistakes or its underlying noise abatement primary goals.

B. Respondent FAA's Continued Perversion Of The Rulemaking Process In 1997 To Avoid Public Input Has Substantially Prejudiced SAFARI, Exposed Its Pilots And Passengers To Needless Aeronautical Risks, And Is Not Moot.

The FAA re-promulgated SFAR 71 in 1997 badged as an "interim rule", seeking to utilize that legal fiction to justify its second failure to issue any NPRM and consider comments. 62 Fed. Reg. 58,854. The renewal was made the rule effective four days *before* it was published, comments were invited only on the 'draft Environmental Assessment,' which exists anywhere in the nine year record, the events subsequent to the initial judicial review of the "emergency" rule document that the Administrator was oblivious to criticisms.

The conduct of the FAA within days of the effective date of the emergency SFAR 71 (and certainly after receipt of Chairman Hall's 27 October 1994 letter) establish for any reasonable mind that the FAA had foreseen that SFAR 71 would be far more draconian, hazardous and financially devastating than it had claimed in SFAR 71's boilerplate promulgation document or had been admitted by FAA legal counsel. SAFARI immediately sought a deviation pursuant to Section 6 the same day SFAR 71 took effect, but was denied any relief based upon a still-secret non-APA regulation which apparently co-existed within the FAA to provide the "real" rules. As revealed by Mr. Beckner's letter denying a deviation, App. G, the FAA was secretly implementing phantom regulations which did not purport to interpret or clarify SFAR 71 in any manner, but instead constituted *sub rosa* regulations which changed existing policy, affected individual rights and obligations

and purported to bind both the regulator and the regulated.

On 13 December 1995 then Administrator David Hinson responded to critical inquiries from Hawaii's senior Senator Daniel K. Inouye:

> We are developing responses to the approximately 100 formal comments we received on the SFAR. After analyzing those comments and the input from all relevant sources, including the recommendations of the National Transportation Safety Board (NTSB), *the rulemaking team will make appropriate changes to SFAR 71. The rulemaking team will address many of the issues you raise, including compression of traffic because of the altitude limitation and whether a lower altitude may be used safely in certain regions of Hawaii. We anticipate finalizing that rulemaking in the near future.*

App. H-1 (Emphasis supplied). Nothing Administrator Hinson represented to Sen. Inouye took place thereafter; no "appropriate changes" were made, nor were the "many issues ... raise[d]" subsequently addressed "by the rulemaking team". Although Administrator Hinson claimed that only two of the 16 Near Mid Air Collision (NMAC) reports filed subsequent to the effective date were valid, even these were never subsequently discussed by the FAA rulemakers,[11] App. H-1, and again refused to

[11] SAFARI had provided the FAA with multiple copies of its taped NMAC to numerous FAA officials, but never received a response or further inquiry from the FAA.

allow a formal meeting between the FAA and the affected operators and pilots. App. H-3.

On 26 December 1995 virtually every helicopter tour pilot in Hawaii (53 pilots with more than a half million logged helicopter hours) petitioned Administrator Hinson to reduce the minimum altitude to 500 feet AGL, to provide 500 feet separation from fixed wing traffic at 1000 feet AGL.[12] When they received no response, Chairman Hall again wrote Administrator Hinson on 26 January 1996 to again express the Safety Board's continued apprehension following an inspection trip to Hawaii about negative impact of SFAR 71 on the safety of air tours and the FAA's underestimation of the massive financial impact SFAR 71 had on the industry generally. App. J.

Chairman Hall underscored his prior critical comments:

> Please allow me to share with you some of the concerns the Safety Board continues to have regarding the air tour industry, particularly in the State of Hawaii. It has been more than a year since SFAR 71 was published for comment; the

[12] Although Administrator Hinson was correct in asserting to Sen. Inouye that numerous helicopter operators had (only after the judicial ruling in March 1995) received deviations down to 1000 feet AGL, he failed to mention that fixed-wing tour operators were also given deviations down to that *same* altitude and that no separation of dissimilar aircraft types had been achieved. App. H-2-3. Administrator Hinson also failed to mention that these 1000 foot deviations were conditioned on altering the stand-off language contained in Section 6(b) of SFAR 71 from "any person or property" (which therefore did not include raw terrain) to "closer than 1500 feet from any terrain". These changes made this deviation more dangerous and useless than SFAR 71 itself, and SAFARI refused to accede to this demand.

> Safety Board provided comment to this rule on October 27, 1995. *The Board continues to believe that SFAR 71, however well intentioned, presents an aviation safety issue, specifically Section 6 "Minimum Flight Altitudes" (1,500 feet above the surface and 1,500 feet standoff distance.)*
>
> *My firsthand visit tells me that this rule has adversely affected the Hawaiian air tour industry to a far greater degree than anticipated. The rule does not take into consideration the impact of local weather conditions on the available airspace for air tour operations, which has been a serious impediment to the industry.* I have flown with the operators, and I have held discussions with their management personnel. They explained that the concentration of air traffic now forced into a compressed flight environment along the coastal areas is the result of the unique weather pattern of the islands and the minimum altitude requirements of SFAR 71.
>
> During our discussions and again during my observation of their air operations, the operators explained that, on designated tour routes, when confronted with a possible emergency, helicopter pilots are confident they can select a suitable landing site and effect and emergency landing from flight altitudes of 5000 feet above the terrain.

App. J 1-2. (Emphasis supplied).

Chairman Hall again sought FAA cooperation with the affected operators, and predicted with eerie accuracy:

> The Safety Board believes that the air tour operators are prepared to significantly contribute to the improvement of their industry if given the

> opportunity. *The Board also believes that the standards put forth in the TOPS program are reasonable and that the minimum altitude provision (500 feet), and perhaps others, can be applied immediately as a basis for the revision of SFAR 71.*
>
> I recently spoke with Dave Harrington of the FAA's Flight Standards Service on the subject of the Hawaii air tour industry. May I please take this opportunity to encourage you and Mr. Harrington to move forward on both the anticipated SFAR 71 revision and on the development of a nationwide policy for air tour operations. *To further delay action on this issue will perpetuate the mistrust and strained communications between the FAA and the air tour operators and, more importantly, continue the negative effects of the concentration of air traffic in Hawaii that result in an unintended degradation of the existing level of safety.*

App. J 3-4. (Emphasis supplied). The FAA continued to stonewall even the NTSB, and took no rulemaking action for another twenty months.

As is discussed below, the FAA attempt to thwart criticisms and further opposition by finally granting deviations to many operators including SAFARI effective 30 October 1997. SAFARI's Operations Specifications (OpSpecs), App. K, represent the type of specific airspace regulatory language which the APA requires to be promulgated within SFAR itself, rather than as a mere license or authorization which the Administrator may withdraw at will in the future. The FAA itself recognized the scope, breadth and criticism of SFAR 71 made in comments to which it was required to respond. 62 Fed. Reg. 58,854,

58,855. The FAA arbitrarily and unlawfully declined to respond to many (possibly 100+) comments, without identification, by vaguely claiming:

> The following discussion contains a summary of comments according to the specific subject areas defined in the SFAR. *It should be noted that comments which were not relevant to these subject areas or were considered to be speculative are not included in this discussion. Because of the time that has expired since the publication of SFAR 71, some of these comments may not have the same relevance because of subsequent events.* In addition, air tour operators and the FAA have worked together to mitigate concerns that the rule is overly burdensome. The FAA's response to these comments is summarized at the end of the comment discussion.

62 Fed. Reg. at 58,855. (Emphasis supplied).

The FAA, facing hard questions and unanswerable criticisms and no longer relying on any professed emergency in 1997, improperly postponed further its consideration of safety-related comments while damning the commenters impacted by SFAR 71 with faint praise:

> With the rulemaking, the FAA will extend SFAR 71 for an additional 3 years. During this time the FAA intends to issue a notice of proposed rulemaking which will apply to all air tour operators. This national rule will be responsive to NTSB comments and those operators who commented that the SFAR was discriminatory against operators in Hawaii. *The proposed rulemaking will consider some of the same issues that commenters have noted in responding to SFAR 71; in this context, the comments on SFAR 71*

> *have been helpful to the FAA. Since the national air tour rulemaking is not yet ripe, the FAA cannot divulge details of the proposed rule,* but does encourage those persons who commented on SFAR 71 to submit comments to the proposed national rule when it is published. The FAA anticipates that the national rule, when finalized, will replace SFAR 71-1, which would then be rescinded.

62 Fed. Reg. at 58,857. The agency's procedure was entirely defective when it retroactively published the Interim Rule in 1997 without a NPRM, and it failed to even await or consider comments during the 2000 renewal, its actions were arbitrary, capricious and contrary to law, and are not moot.

The FAA's belated responses failed to comply with the rulemaking requirements recognized in *Grand Canyon Air Tour Coalition v. Federal Aviation Administration*, 154 F.3d 455 (D.C. Cir 1998):

> An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them. See *McLouth [Steel Products Corp v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)] at 1323. An agency must demonstrate the rationality of its decision making process by responding to those comments which are deemed relevant and significant. See *Professional Pilots Fed'n. v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1997); *Home Box Office, Inc., v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

154 F.3d at 468.

The Circuit Court erred when it concluded that " . . . no purpose would be served by reviewing . . . " the rule-making procedures for this non-NPRM rulemaking in the 1997 interim rule proceeding, and dismissed SAFARI's petition as moot. *Safari Aviation Inc. v. Garvey*, App. A-9. SAFARI is entitled to judicial review of the 1997 rule, as it continues to exist in an environment where the abusive rulemaking in 2000 relied upon it. This scenario presents the classical exemption from mootness where the defective rulemaking is "capable of repetition, yet evading review." See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190-91 (2000). The 'capable of repetition, yet evading review' exception to mootness applies only when "(1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001).

Even if the Circuit Court was not disturbed with the FAA's dubious claim of an emergency in 1994, and its 1997 failure to use a notice and comment process, the Circuit Court shirked its statutory duty of judicial review and utilized clearly false findings to criticize SAFARI for catching the FAA once again at deficient rulemaking.

C. The FAA Denied Petitioner SAFARI Its Constitutional, Statutory And Regulatory Right To Participate In The 2000 Rulemaking Refusing To Comply With Its Own NPRM Or Await Mail Delivery Of Timely Comments.

The Ninth Circuit opinion excused the FAA's latest rulemaking insolence by falsely implying that Petitioner SAFARI's critical comments respecting the 2000 repromulgation were untimely, which calls into question whether it exercised the judicially-required scrutiny of self-serving "mistakes" such as promulgating a rule prior to the close of the comment period. The lower court incorrectly claimed:

> The deadline for comments on the proposed extension was September 22, 2000.
>
> Safari mailed its comments regarding the proposed extension of SFAR 71 on September 22, 2000, and the FAA received them on September 25, 2000.

App. A-6. The NPRM stated:

> **DATES**: Send your comments on or before September 22, 2000.

65 Fed. Reg. 51512. SAFARI's comments were both timely and ignored. Rather than conceding that the FAA had jumped the gun, the Court accepted the FAA litigation claim that this exclusion from the rulemaking process was harmless. App. A. 12-13. The FAA was not going to listen to comments, so this conclusion is accurate but the finding illegal.

SAFARI's comments were based upon an extensive study and reconstruction of the two fatal helicopter accidents, App. L1-4, unlike the off-hand comment of Blue Hawaiian Helicopters that " ... some air tour pilots believe that SFAR 71 may have contributed to three accidents that have occurred since the SFAR was adopted in 1994." 65 Fed. Reg. 58.610. The Ninth Circuit Court was insufficiently skeptical of FAA litigation claims, and SAFARI was materially prejudiced by both the lack of insight contained in the Court's disingenuous whitewash and uncritical acceptance of the FAA claim disputing relevance of SAFARI comments seeking to avoid further loss of life.

II. THE NINTH CIRCUIT DECISION EXPANDS JUDICIAL TOLERANCE OF "INTERPRETIVE RULES" BEYOND ALL PRIOR STATUTORY OR JUDICIAL LIMITS.

The decision below provides *carte blanche* power to the FAA to impose unreasonably restrictive rules (even by emergency "good cause" rulemaking) and then to exercise unbridled agency discretion and/or to create *de facto* substantive rules internally to effect the real system of regulation. The Ninth Circuit erred in its analysis of Respondent FAA use of the so-called "deviation authority" to alter, amend and repeal portions of Section 6, and declined to define what it considered to be the legal and factual criteria for a valid interpretive rule. SAFARI challenged the FAA's use of non-APA promulgated "rules" to *de facto* amend SFAR 71 by means of "exceptions" and "deviations" in response to massive safety and economic criticisms, rather than amending the underlying SFAR 71

itself in response to the comments SAFARI and virtually all other aviation entities.

The decision below conflicts with prior precedent of this Court, of the District of Columbia Circuit and with prior panel decisions in the Ninth Circuit. This non-APA rulemaking power does not exist, *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989), and approves of a scope of interpretive rules far beyond the limitations of *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995). The panel decision ruled:

> We also reject Safari's objections to the FAA's practice of granting case-by-case deviations to avoid clustering of aircraft at the 1,500 foot level. The deviations are interpretive rules which apply the "exceptions" provision of Section 6 of SFAR 71.

App. A-11. The panel offered no analysis of its factual or legal perception of the exercise of authority to issue binding "deviations" from Section 6 as merely "interpretive"; significantly, it failed to identify what law or regulation was being "interpreted."

The only possible applicable language being interpreted would be Section 6's phrase " . . . as otherwise authorized by the Administrator." Although this is a common phrase throughout Federal Aviation Regulations, it does not legally qualify to exempt future non-APA rulemaking. This phrase, as implemented by the FAA and authorized by the Ninth Circuit, claims unilateral FAA power to reserve to itself by one APA rulemaking the future power to exempt itself from the APA. This same claim was made and rejected long ago in *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989) ("Such

agency-generated exemptions would frustrate Congress' underlying policy in enacting the APA by rendering compliance optional.") --

The FAA has properly utilized interpretive rules in the past and is cognizant of the legal restrictions on their use of interpretive rules where legislative rulemaking (also known as substantive rules) is required. See *Air Transport Ass'n. v. FAA*, 291 F.3d 49 (D.C. Cir. 2002) (FAA clarification by letter of phrase "Scheduled completion of any flight segment" in highly specific duty time regulations to avoid abuse; the interpretation was "fairly encompassed" within regulation it purports to construe); *Hudson v. FAA*, 192 F.3d 1031, 1035-36 (D.C. Cir. 1999) (Interpretive rules and policy statements merely interpret legal norm rather than imposing or elaborating a legal norm). This Court, in *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995) set forth the proper use of interpretive rules; it stated:

> We can agree that APA rulemaking would still be required if PRM § 233 *adopted a new position inconsistent with any of the Secretary's existing regulations.*

514 U.S. at 100 (Emphasis supplied).

Although the FAA labeled these deviations as being issued on a "case-by-case" basis, the record belies that claim. Both the language of the OpSpecs containing the deviations, and the criteria for issuing them, establish that they are *de facto* legislative rules. App. K. Although the processing of the OpSpecs for deviations may proceed on a case-by-case basis, the criteria to be applied were fixed, both by Mr. Beckner's letter (App. G) and the later standardized OpSpec language (App. K) were fixed. The

lower Court had an independent duty to review of self-serving agency labels created only in litigation, *Cubanski v Heckler,* 781 F.2d 1421, 1426 (9th Cir. 1986), but failed to do so.

The Court below relied on documents not in the Record and overlooked the non-existence of one critical document (which was only created on 4 April 2002) after oral argument was scheduled in this case; it was not available to the public as required. The document "Guidance for Air Tour Operations Below 1,500 Feet AGL in Hawaii; OpSpec B048", was utilized by the panel to support its own ruling, but SAFARI maintains that comprehension of this document established as a matter of law that the deviation authority documents were intended to bind both the FAA and the Operators 300 F.3d at 1151 [Emphasis supplied]. Detailed criteria are the same as rules, and the OpSpecs derived from these detailed criteria read far more like regulations than interpretations, and are substantive rules which require APA procedures. App. K.

Section 6 of SFAR 71 contained flight altitudes set by regulation which were specific and detailed; the lower court sought to morph the FAA's attempt to reserve unto itself complete legal authority to amend rather than clarify or interpret SFAR 71 into a mere interpretation of SFAR 71:

> By granting the deviations, the FAA has provided "the majority of Hawaii air tour operators" with specific interpretations of how SFAR 71's minimum altitude requirement applies to them in light of their individual safety qualifications and differences in local terrain and prevailing conditions.

App. A-11. SFAR 71's minimum altitude is clearly 1500 feet AGL. Because Section 6 of SFAR 71 left nothing to clarify or interpret, the Panel has authorized the FAA to engage in substantive legislative rulemaking altering altitudes, amending Section 6, granting new rights and imposing new obligations without APA compliance.

One characteristic of the deviations which exclude them from being interpretive rules is that the FAA has reserved to itself the power to revoke them at will from individual operators. What the Administrator giveth, the Administrator may taketh away. See Petitioner SAFARI's OpSpecs:

> J. This authorization may be canceled immediately for non-compliance of one or more of the above stated conditions.

App. K-2. Subsequently, the FAA revealed that its policy of enforcement of SFAR 71 would rely upon its claimed power to summarily terminate the deviations. During the 2000 rulemaking, SAFARI and other operators received an FAA Order involuntarily altering its Operations Specifications to state the Administrator's " . . . intent to revoke SFAR 71 authorization below 1,500 feet for thirty days in the event a company's air tour pilot is *charged* with any violation of the SFAR 71 authorization." App. M. The panel's finding that the use of deviations (and the documents the FAA has promulgated to bind itself and operators in obtaining and revoking deviations) were interpretive rather than substantive illegally expands agency exemption are beyond any legal authority.

II. CONCLUSION

For the reasons and authorities contained herein, Petitioner SAFARI AVIATION, INC. respectfully prays for this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: Honolulu, Hawaii, 3 February 2003.

DAVID GLENN BETTENCOURT
Attorney for Petitioner
Safari Aviation, Inc.
dba Safari Helicopter Tours

APPENDIX A

300 F.3d 1144

United States Court of Appeals,
Ninth Circuit.

SAFARI AVIATION INC., dba Safari Helicopter Tours,
Petitioner,
v.
Jane F. GARVEY, Administrator, Federal Aviation Administration, Respondents.
Safari Aviation Inc., dba Safari Helicopter Tours, Petitioner,
v.
Federal Aviation Administration, Respondent.

Nos. 98-70013, 00-71520.

Argued and Submitted May 7, 2002.
Filed Aug. 26, 2002.

David Glenn Bettencourt, Honolulu, Hawaii, for the petitioner.

Constance A. Wynn, Department of Justice, Civil Division, Washington, D.C., for the respondent.

On Petitions for Review of Two Orders of the Federal Aviation Administration. FAA No. 27919.

Before WALLACE, TASHIMA and TALLMAN, Circuit Judges.

OPINION

TALLMAN, Circuit Judge.

Safari Aviation, Inc., d/b/a Safari Helicopter Tours ("Safari") is an aeronautical business which operates helicopters and fixed-wing aircraft for sightseeing tours of

tourist attractions in Hawaii as an on-demand Air Taxi Commercial Operator. Safari petitions for review of two orders of the Federal Aviation Administration ("FAA") promulgating Special Federal Aviation Regulation 71 ("SFAR 71"), which establishes procedural, operational, and equipment safety requirements for air tour operators in Hawaii. We upheld emergency rule SFAR 71, issued on September 16, 1994, in *Hawaii Helicopter Operators Ass'n. v. FAA,* 51 F.3d 212 (9th Cir.1995). In No. 98-70013, Safari petitions for review of the FAA's decision to extend SFAR 71 for an additional three years. In No. 00-71520, Safari petitions for review of the FAA's decision to establish SFAR 71 as a final rule. Safari contends that the FAA unlawfully and arbitrarily promulgated SFAR 71, and that the final rule decreases aviation safety and increases the risk of predictable accident scenarios. We have jurisdiction under 49 U.S.C. § 46110, and we dismiss the petition in appeal No. 98-70013 as moot, and deny the petition in appeal No. 00-71520.

I. Facts and Prior Proceedings

A. Emergency Rule SFAR 71

The FAA issued SFAR 71 as an emergency rule in September 1994. Air Tour Operators in the State of Hawaii, 59 Fed.Reg. 49,138 (Sept. 26, 1994) (codified at 14 C.F.R. pts. 91 & 135). The FAA cited "an escalation of air tour accidents" as the reason for the rule, and stated that "[t]he regulation is intended to enhance the safety of air tour operations within the State." *Id.* Accident data for the nine-year period between 1982 and 1991, a time of substantial industry growth, established that there were eight air tour accidents in Hawaii which resulted in a total of twenty-four fatalities. For the three-year period from July

1991 through July 1994, the agency reported that the accident rate jumped to twenty air tour accidents with twenty-four fatalities. *Id.* at 49,139.

The FAA was concerned about the substantial increase in the accident rate and the risks associated with low-flying air tours in Hawaii.[1] SFAR 71 imposes "Special Operating Rules" for airplane and single-engine helicopter air tours. Section 3 of the regulation requires operators who venture off shore to either use amphibious helicopters or helicopters equipped with floats; or they must require passengers to wear approved flotation gear. *Id.* at 49,145. Section 4 requires operators to file a helicopter performance plan before each air tour flight. Section 5 mandates that air tour operators maintain appropriate height and forward speed to allow the safe landing of helicopters in the event of an engine failure. *Id.* at 49,146.

Section 6 imposes a minimum flight altitude of 1,500 feet above ground level for all aircraft, and requires operators to maintain a standoff distance of 1,500 feet from any person or property except when necessary for takeoff and landing, air traffic control compliance, or as otherwise authorized by the FAA. Section 7 requires air tour operators to brief passengers on water ditching procedures, use of required flotation equipment, and emergency egress from the aircraft in the event of a water

[1] The FAA also cited the fact that the National Transportation Safety Board ("NTSB") made specific recommendations to the FAA regarding the need for increased safety regulation of air tours in Hawaii following its investigation of an accident which occurred near Mt. Haleakala on the Island of Maui in April 1992. 59 Fed.Reg. at 49,141.

landing. *Id.* The emergency rule became effective on October 26, 1994, and the public comment period ended on December 27, 1994.

The Hawaii Helicopter Operators Association ("HHOA") promptly petitioned this Court to challenge the validity of the emergency rule on the ground that it was issued in violation of the Administrative Procedure Act's ("APA") notice and comment provision, 5 U.S.C. § 553(c). In a published opinion, we held that the FAA had properly invoked the good cause exception to § 553(c), and we rejected HHOA's claim that the 1,500-foot minimum altitude requirement in SFAR 71 was arbitrary and capricious. *Hawaii Helicopter Operators Ass'n. v. FAA,* 51 F.3d 212, 214-16 (9th Cir.1995).[2]

B. Interim Rule SFAR 71

The FAA extended SFAR 71 as an interim rule on October 30, 1997, with the stated goal of "ensur[ing] that regulatory requirements for the safe operation of air tours in the airspace over the State of Hawaii remain in effect." Air Tour Operators in the State of Hawaii, 62 Fed.Reg. 58,854 (Oct. 30, 1997) (codified at 14 C.F.R. pts. 91 & 135). The FAA also published a "discussion" of some of the more than 200 public comments it received from entities including the NTSB, air tour operators, helicopter associations, and environmental groups. *Id.* at 58,855-58,859.

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[2] Our opinion also expressly retained jurisdiction "of any further petitions for review of SFAR No. 71 or any other successor regulation from the comment period" by the *Hawaii Helicopter* panel. 51 F.3d at 216. The prior panel subsequently relinquished jurisdiction to this panel of the Court.

Many comments were critical of the minimum flight altitude requirement, including the concern that the requirement does not account for cloud cover and weather conditions in Hawaii which affect visibility and may compromise a pilot's ability to maintain the required distance from clouds. Several commenters, including the HHOA, also warned that the minimum altitude requirement will cause air tour traffic to be concentrated at the same altitude, thereby increasing the risk of mid-air collisions and decreasing overall air safety. The NTSB expressed the concern that the altitude requirement may lead to increased operating time over water, difficulties in regulatory enforcement, and possible disregard of the FAA regulation.

The FAA agreed that the minimum operating altitude requirement was "[o]ne of the most contentious aspects" of SFAR 71, but noted that "after working closely with air tour operators," it had mitigated the problem by allowing selected deviations on a case-by-case basis. *Id.* at 58,857. Since 1994, the FAA has granted deviations to "the majority of air tour operators" in Hawaii. For instance, air tour operators of single-engine helicopters have been granted deviations to conduct air tours at a minimum of 500 feet. These deviations are site-specific, and are only allowed over areas of raw terrain (i.e., areas devoid of persons, vehicles, etc.). Safety is not compromised, the FAA asserts, because of additional safety measures, including careful FAA screening of operators before they are granted a deviation. *Id.*

In response to comments regarding costs associated with complying with SFAR 71, the FAA states that it "believes that the SFAR has not had a direct impact on the viability of the air tour industry in Hawaii." By granting

deviations, the FAA contends, it has mitigated the costs of the SFAR and ensured that commercially viable air tours are still available to the public. Finally, in response to comments that the FAA's promulgation of SFAR 71 was a response to residents' complaints about noise pollution, the FAA "reiterates its strong statement" that safety was the reason the agency promulgated the rule.

C. Final Rule SFAR 71

The FAA issued a notice of proposed rulemaking ("NPRM") on August 23, 2000, indicating an intent to extend interim rule SFAR 71 for another three years and soliciting comments on the extension of SFAR 71 as a final rule. Air Tour Operators in the State of Hawaii, 65 Fed.Reg. 51,512 (Aug. 23, 2000) (codified at 14 C.F.R. pts. 91 & 135). In this NPRM, the FAA explained that the extension was necessary to provide additional time for the agency to issue an NPRM regarding a national rule that would apply to all air tour operators. *Id.* The deadline for comments on the proposed extension was September 22, 2000.

Safari mailed its comments regarding the proposed extension of SFAR 71 on September 22, 2000, and the FAA received them on September 25, 2000. In its statement, Safari contended that "the imprudent and unjustified specifications within SFAR 71 have claimed the lives of thirteen person[sic] in two fatal helicopter accidents. . . . " The document goes on to detail how the 1,500 foot minimum altitude requirement may have played a factor in two recent air tour helicopter accidents.

The FAA nonetheless issued the final rule extending SFAR 71 for another three years on September 29, 2000.

Air Tour Operators in the State of Hawaii, 65 Fed.Reg. 58,610 (Sept. 29, 2000) (codified at C.F.R. pts. 91 & 135). The FAA again indicated its intent, in the near future, to promulgate a national rule to apply to all air tour operators, at which time SFAR 71 would be rescinded. *Id.* In its discussion of the comments regarding the extension of SFAR 71, the FAA indicated that it had received four comments, all of which supported the extension. Regarding the NPRM published on August 23, 2000, the FAA reported having received only one adverse comment, from Blue Hawaiian Helicopters. This comment indicated that "some air tour pilots believe the altitude restrictions may have contributed to the three accidents that have occurred since the SFAR was adopted in 1994." *Id.* The FAA did not review Safari's comments before issuing the final rule extending SFAR 71.

The FAA justified its promulgation of emergency final rule SFAR 71 on the grounds that a "large number of accidents . . . occurred in Hawaii between 1982 and 1991"; that the interim and final versions of SFAR 71 were needed to ensure the safety of all air tour operations in Hawaii; and that the forthcoming national air tour safety rule would soon replace SFAR 71. As to the cause of the three accidents referenced by Blue Hawaiian, the FAA declined to respond on the ground that the NTSB had not yet issued a final report on any of these accidents, but that the "complete accident history of tour operations in Hawaii supports the extension of SFAR 71." *Id.* at 58,611.

D. Circuit Court Proceedings

Safari filed a timely petition for review of the October 1997 interim rule. The parties consented to mediation

pending the FAA's publication of a NPRM regarding the "forthcoming" national air tour safety rule. After three years in mediation, and with the expiration of the interim rule looming, the FAA reissued SFAR 71 as a final rule on September 29, 2000. Safari then filed a timely petition for review of the final rule. In light of the FAA's failure to publish the NPRM regarding a national air tour rule, Safari's two petitions were subsequently consolidated and submitted for our decision.

II. Analysis

Under the APA, we may not set aside an agency's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . " 5 U.S.C. § 706(2)(A) (2001); *Brower v. Evans,* 257 F.3d 1058, 1065 (9th Cir.2001). We also apply the arbitrary and capricious standard to resolve factual disputes involving substantial agency expertise. *Ninilchik Traditional Council v. United States,* 227 F.3d 1186, 1194 (9th Cir.2000). Review under this standard is narrow, and we must not substitute our judgment for that of the agency. *Id.* "Agency action should be overturned only when the agency has 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.,* 265 F.3d 1028, 1034 (9th Cir.2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

A. The Rulemaking Proceedings

Safari seeks review of both the October 1997 interim rule, which expired on October 26, 2000, and the October 2000 final rule, which remains in effect until October 2003. As the life of the interim rule is over, no purpose is served by reviewing its rulemaking procedures. However, the final rule is in substance identical to the interim rule. Comments and responses made during the promulgation of the interim rule address the same issues as were raised with respect to the final rule. Therefore, while we do not review the October 1997 interim rule and its associated rulemaking procedures, we may nonetheless consider the comments and the FAA's responses with respect to the October 1997 interim rule in reviewing the promulgation of the October 2000 final rule. As we explain later, we dismiss Safari's procedural complaints regarding the interim rule as moot because that rule has expired.

Safari argues that the FAA failed to conduct a meaningful disposition of "possibly 100+" comments it received which were critical of its safety analysis, and that it dismissed criticism from knowledgeable sources (i.e., pilots) by simply referring to its practice of granting deviations in response to these concerns. In particular, Safari contends that the FAA failed to address comments that the 1,500-foot minimum altitude requirement does not take into account prevailing weather conditions in Hawaii, that it may increase the probability of flying into bad weather, that it will cause air tour traffic to be concentrated at the same altitude, and that it creates hazardous conditions for emergency landings. As for the FAA's policy of granting deviations, Safari suggests that because the FAA did not detail the circumstances under which it

grants (or declines to grant) deviations, this practice may itself constitute unlawful rulemaking.

"The APA requires an agency to: (1) publish a general notice of proposed rulemaking; (2) give interested parties an opportunity to participate in the rulemaking through submission of data, views, and arguments; and (3) adopt a rule after consideration of the relevant matter presented." *Hall v. EPA,* 273 F.3d 1146, 1163 (9th Cir.2001). We will not usually overturn agency action unless there is a showing of prejudice to the petitioner. *Id.* at 1163-64. An agency's failure to respond to comments will not support reversal unless it reveals that the agency's decision was not based on consideration of the relevant factors. *Am. Mining Cong. v. EPA,* 965 F.2d 759, 771 (9th Cir.1992).

The FAA adequately responded to the comments it received regarding SFAR 71. The FAA was required to respond only to "significant" comments, a category limited to those which "raise relevant points, and which, if adopted, would require a change in the agency's proposed rule." *Id.* Both parties agree that the most "contentious" aspect of SFAR 71 is the 1,500-foot minimum altitude requirement. The FAA summarized the numerous safety concerns which were raised regarding this requirement, and explained in response that it believed that the requirement would improve safety by giving pilots more time to react to emergency situations. It is reasonable to believe that pilots of higher flying aircraft will have more time to locate a suitable landing site in an emergency, and will be better able to prepare and instruct passengers. Thus, the FAA both acknowledged the comments identified by Safari and provided a reasoned response which demonstrated that its action was based on relevant safety considerations.

We also reject Safari's objections to the FAA's practice of granting case-by-case deviations to avoid clustering of aircraft at the 1,500 foot level. The deviations are interpretive rules which apply the "exceptions" provision of Section 6 of SFAR 71. We review de novo whether an agency's action results in an interpretation or a new rule. *Gunderson v. Hood,* 268 F.3d 1149, 1154 (9th Cir.2001). Interpretive rules are not subject to APA notice or comment provisions because they clarify or explain existing law or regulations in order to advise the public of the agency's construction of the rules it administers. *Id.* By granting the deviations, the FAA has provided "the majority of Hawaii air tour operators" with specific interpretations of how SFAR 71's minimum altitude requirement applies to them in light of their individual safety qualifications and differences in local terrain and prevailing conditions. This is another rational reason the FAA has provided to explain why the safety related criticisms of SFAR 71 have been mitigated since the rule's enactment.[3]

Safari also argues that the FAA ignored the comments it made in response to the rulemaking. Safari contends that the FAA failed to include its comments regarding the August 23, 2001, NPRM in the administrative record, and that it failed to issue a response. By making these omissions,

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[3] The FAA cites agency documents which detail the criteria for granting deviations under SFAR 71. *See* Air Transportation Operation Inspector's Handbook, Section 8400.10, Vol. 1, Chap. 4, § 4, "Exemptions, Deviations, Waivers and Authorizations," (available at http://www.faa.gov/avr/afs/faa/8400/8400_vol1/1_004_04.pdf); Section 8400.10, Vol. 3, Chap. 1, § 4, Part B, Op Spec B048, "Operations in the Vicinity of the Hawaiian Islands," (available at http://www.opspecs.com/OpssDraftParaTalks/ Final/01-b48.doc).

Safari asserts that the FAA denied its constitutional, statutory, and regulatory right to participate in the rulemaking.

The FAA admits that it "overlooked" Safari's comment on the final rule, as well as the comments submitted by three other groups.[4] These four comments were not examined by the FAA until after the final rule went into effect. The FAA argues, however, that its failure to consider the comments before promulgating the final rule does not support reversal because none of the four comments raised new issues. SFAR 71 had already been extended twice, the FAA contends, and had remained unchanged since its initial enactment in 1994. The FAA was not required to reiterate its prior responses to issues which were adequately addressed during previous rulemaking proceedings.

We hold that the FAA's failure to examine Safari's comments before promulgating the final rule is harmless under these circumstances. The main thrust of Safari's comments on the final rule concerned safety aspects of the 1,500-foot minimum flight altitude requirement, an issue that had been extensively commented on and discussed in previous rulemaking proceedings. Most of Safari's points were also made by Blue Hawaiian Helicopters, an entity

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[4] The other "lost" comments were from two organizations with concerns about flights [sic] paths over sensitive areas, and a government organization's favorable comments regarding the final rule. The environmental concerns raised by the two organizations were substantially addressed in the FAA's promulgation of the interim rule, and the FAA's failure to address them before promulgating the final rule is not at issue in this proceeding.

whose comments were specifically referenced by the FAA in the final rule. Blue Hawaiian argued, just as Safari did, that recent air tour accidents had been caused by SFAR 71.

The FAA declined to address the cause of these accidents because the NTSB reports were not yet available, but reiterated that the overall accident rate during the period before enactment of SFAR 71 justified the safety measures contained therein. 65 Fed.Reg. 58,610, 58,611. The FAA also pointed to its practice of granting deviations to the majority of air tour operators as evidence that it mitigated the negative effects of the minimum altitude requirement. Finally, the sharp drop in the accident rate since the enactment of SFAR 71 persuasively suggests that it has helped to increase overall air tour safety. 62 Fed.Reg. 58,854, 58,856-58,857. In light of these facts, the FAA's response to comments regarding the cause of recent air tour accidents was adequate.

Safari claims that the FAA engaged in "improper ex parte contacts" during the rulemaking proceedings and requests that we direct supplementation of the administrative record as a remedy. Safari fails to cite any evidence of improper communications between the FAA and Hawaii's congressional delegation, or with any other officials. We reject this unsubstantiated claim.

Finally, Safari identifies two minor procedural deficiencies regarding the extension of SFAR 71 as an interim rule in 1997 as grounds for reversal of the FAA's actions. Because the interim rule has since expired, these procedural issues are moot.

B. The Basis for SFAR 71

Safari argues that SFAR 71 is itself arbitrary and capricious because it imposes requirements on Hawaii's air tour industry not applicable to pilots in any of the 49 other states. Safari argues that Hawaii's topography alone cannot justify SFAR 71, and suggests the rule was motivated by complaints about noise raised by some residents who objected to overflights of their land.

We reject Safari's bald assertion that in extending SFAR 71, the FAA "secretly attempted to establish a one-state noise rule in the guise of a safety rule." The FAA's rulemaking in this case is a rational response to the escalation of air tour accidents (and attendant fatalities) just prior to its promulgation, and the request by the NTSB for increased FAA safety regulation of Hawaii air tour operators. Extension of SFAR 71 as both an interim and final rule is also justified by the decrease in the air tour accident rate subsequent to the initial promulgation of SFAR 71. We hold that the rule is neither arbitrary nor capricious.

III. Conclusion

The FAA did not arbitrarily and capriciously deny Safari the opportunity to participate in a meaningful rulemaking proceeding when it twice extended SFAR 71. The FAA solicited and later discussed comments it received from interested parties, and fairly addressed the relevant criticisms of the rule. Safari's claims regarding the FAA's failure to address some of its comments and its assertions regarding minor procedural defects in the rulemaking process are rejected because Safari failed to demonstrate any prejudice. Finally, the FAA had a rational

basis for promulgating SFAR 71, and the rule is not arbitrary or capricious.

The petition in No. 98-70013 is **DISMISSED.** The petition in No. 00-71520 is **DENIED.**

APPENDIX B

51 F.3d 212

United States Court of Appeals,
Ninth Circuit.

HAWAII HELICOPTER OPERATORS ASSOCIATION, Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, Respondent.

No. 94-70703.

Argued and Submitted Jan. 10, 1995.
Decided March 29, 1995.

Patricia Barlow, Carole Morrell, Elliott Myles, Law Offices of Patricia Barlow, San Francisco, CA, for petitioner.

Timothy P. Melcher, F.A.A., Washington, DC, for respondent.

Petition for Review of a Federal Aviation Administrative Order.

Before: GOODWIN and SCHROEDER, Circuit Judges, and TASHIMA,* District Judge.

SCHROEDER, Circuit Judge:

The Hawaii Helicopter Operators Association ("HHOA") petitions, pursuant to 49 U.S.C. § 46110(a), for review of the Federal Aviation Administration's issuance of

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* Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

Special Federal Aviation Regulation ("SFAR") No. 71 establishing special operating rules, procedures and limitations for airplane and helicopter air tour operators in Hawaii. The regulation was promulgated on an emergency basis pursuant to the exception contained in 5 U.S.C. § 553, which exempts an agency from complying with the notice and comment requirements of the Administrative Procedure Act ("APA") where good cause exists. HHOA's principal grievance is with SFAR No. 71's prohibition against air tour aircraft flying below a minimum altitude of 1,500 feet. HHOA also objects to the requirements that helicopters be amphibious and equipped with emergency flotation gear, or that each person on board wear approved flotation gear.

The FAA promulgated SFAR No. 71 after a series of seven helicopter accidents involving four fatalities, which occurred in the first nine months of 1994. The regulation was promulgated September 26, 1994. It became effective on October 26, 1994.

HHOA initially contends that the FAA improperly invoked 5 U.S.C. § 553(b)(B), the good cause exception to the notice and comment requirements of the APA's rulemaking provision. The APA provides that notice and comment may be waived by an agency when it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

This court has said that our "inquiry into whether the Secretary properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play."

Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir.1984). We have observed that notice and comment procedures should be waived only when "delay would do real harm." *Buschmann v. Schweiker,* 676 F.2d 352, 357 (9th Cir.1982) (quoting *U.S. Steel Corp. v. EPA,* 595 F.2d 207, 214 (5th Cir.1979)), *reh'g granted,* 598 F.2d 915 (1979); *see also Washington State Farm Bureau v. Marshall,* 625 F.2d 296, 306-07 (9th Cir.1980).

In this case the FAA based its invocation of the "good cause" exception on Hawaii's "recent escalation of fatal air tour accidents." The FAA further explained that the problem was urgent:

> Despite voluntary measures, the cooperation of the Hawaii air tour operators, and the FAA's inspections, the accident data show that voluntary measures and existing regulations are insufficient to ensure safe air tour operations in Hawaii. The recent accidents . . . indicate an urgent safety problem that cannot be adequately addressed solely by enforcement of existing regulations.

Air Tour Operators in the State of Hawaii, 59 Fed.Reg. 49138, 49145 (Sept. 26, 1994) (to be codified at 14 C.F.R. §§ 91 and 135). The FAA listed specific facts supporting its reasons for issuing SFAR No. 71. These facts included: (1) there had been 20 air tour accidents between 1991 and 1994, including 24 fatalities; (2) among the 20 accidents, seven had occurred in 1994; (3) the most recent fatal accident had occurred on July 14, 1994; (4) the most recent non-fatal accident had occurred on September 4,

1994, only three weeks before SFAR No. 71 was promulgated.[1]

We perceive no indication in this record that the FAA waived notice and comment for any reasons other than its concern about the threat to public safety reflected in an increasing number of helicopter accidents. The FAA adequately explained the basis for taking emergency action without waiting for public participation. *Compare San Diego Air Sports Center, Inc. v. FAA,* 887 F.2d 966, 970 (9th Cir.1989) (FAA did not comply with provisions of § 553 when it issued letter disallowing parachuting without any explanation of why it felt emergency action was needed and where only known accident had occurred two years earlier.).

HHOA also contends that SFAR No. 71 is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious within the meaning of the APA when the agency

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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[1] In the FAA's letter to HHOA denying HHOA's petition for stay of SFAR No. 71, the FAA noted that another non-fatal accident occurred on October 24, 1994, two days before SFAR No. 71 was to become effective.

Beno v. Shalala, 30 F.3d 1057, 1073 (9th Cir.1994) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 44, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983)). The reviewing court "may not substitute its judgment for the agency's; rather, it is limited to an inquiry whether the agency's decision was based on a consideration of relevant factors and whether there was a clear error of judgment." *Marshall,* 625 F.2d at 302. An agency's factual findings must be upheld "if those findings are supported by substantial evidence on the record as a whole." *Arkansas v. Oklahoma,* 503 U.S. 91, 113, 112 S.Ct. 1046, 1060, 117 L.Ed.2d 239 (1992).

HHOA's principal objection is to the 1,500 foot minimum flying altitude requirement. The FAA summarized its rationale as follows:

> Hawaii's unique topography often complicates access to suitable emergency landing areas. The air tour accidents in Hawaii have been characterized by insufficient time for pilots to locate suitable landing areas after engine power loss or other problems leading to accidents. The requirement to maintain an altitude of 1,500 feet above the surface is necessary for safety because it allows the pilot sufficient time to react in an emergency, to notify and instruct passengers, and to prepare for a forced landing. An aircraft operating at least 1,500 feet above the surface allows the pilot a greater opportunity to select a suitable landing site than would be the case at lower altitudes.

Air Tour Operators in the State of Hawaii, 59 Fed.Reg. 49138, 49143. On the basis of the record before this court, the regulation bears a rational relationship to

legitimate FAA safety concerns and is neither arbitrary nor capricious.

HHOA also objects to the SFAR 71's flotation requirements, contending that no rational basis supports singling out helicopters flown in Hawaii for such regulation. The regulation itself adequately explains that flotation requirements were imposed after a study of recent helicopter accidents in Hawaii showed that crash victims of accidents where flotation equipment was available were much less likely to drown than victims of helicopter accidents where no such equipment was available. Air Tour Operators in the State of Hawaii, 59 Fed.Reg. 49138, 49142. We conclude that a reasonable basis supported the flotation requirement.

HHOA also contends that due process requires the FAA to provide some notice and comment before promulgating the regulation. Where the requirements of § 553 have been satisfied, however, the Constitution imposes no higher procedural requirements. *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978) ("[Section 553 establishes] the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.").

Moreover, the FAA has not barred all input from interested parties such as HHOA. Under SFAR No. 71,

> interested persons are invited to submit such comments as they desire regarding this SFAR. . . . All communications received on or before the close of the comment period will be considered by the Administrator, and this SFAR may be changed in light of the comments received. All

> comments will be available, both before and after the closing dates for comments, in the Rules Docket for examination by interested parties.

Air Tour Operators in the State of Hawaii, 59 Fed.Reg. 49138, 49145.

In this manner, the FAA left the record open for a comment period that has recently expired. The FAA has indicated that it may modify SFAR No. 71 in response to comments. The record reflects that a number of comments, including comments from the National Transportation Safety Board, have directed criticism at SFAR No. 71. These comments may well merit response by the FAA.

When the FAA does respond to the comments, its action, including any modifications of the regulation, will constitute final agency action reviewable by this court. *See, e.g.,* 14 C.F.R. §§ 11.61-11.69.

This panel will retain jurisdiction of any further petitions for review of SFAR No. 71 or any successor regulation emerging from the comment period. *See, e.g., Klein v. Sullivan,* 978 F.2d 520, 521 (9th Cir.1992).

REVIEW DENIED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAFARI AVIATION INC., dba Safari Helicopter Tours, Petitioner, v. JANE F. GARVEY, Administrator, FEDERAL AVIATION ADMINISTRATION, Respondents.	No. 98-70013 FAA No. 27919 ORDER

SAFARI AVIATION INC., dba Safari Helicopter Tours, Petitioner, v. FEDERAL AVIATION ADMINISTRATION, Respondent.	No. 00-71520 FAA No. 27929

(Filed Nov. 5, 2002)

Before: WALLACE, TASHIMA and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Tashima and Tallman have voted to

deny the petition for rehearing en banc and Judge Wallace has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends parts 91 and 135 of the Federal Aviation Regulations (14 CFR parts 91 and 135) as follows:

PART 91 – GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. app. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514, 35 FR 4247, 3 CFR, 1966-1970 Comp., p. 902; 49 U.S.C. 106(g).

PART 135 – AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

2. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. app. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g).

3. In parts 91 and 135, Special Federal Aviation Regulation No. 71, the text of which will appear at the beginning of part 91, is added to read as follows:

SFAR No. 71 – Special Operating Rules for Air Tour Operators in the State of Hawaii

Section 1. Applicability. This Special Federal Aviation Regulation prescribes operating rules for airplane and helicopter visual flight rules air tour flights conducted in the State of Hawaii under parts 91 and 135 of the Federal Aviation Regulations. This rule does not apply to flights conducted in gliders or hot air balloons.

Section 2. Definitions. For the purposes of this SFAR:

"Air tour" means any sightseeing flight conducted under visual flight rules in an airplane or helicopter for compensation or hire.

"Air tour operator" means any person who conducts an air tour.

Section 3. Helicopter flotation equipment. No person may conduct an air tour in Hawaii in a single-engine helicopter beyond the shore of any island, regardless of whether the helicopter is within gliding distance of the shore, unless:

(a) The helicopter is amphibious or is equipped with floats adequate to accomplish a safe emergency ditching and approved flotation gear is easily accessible for each occupant; or

(b) Each person on board the helicopter is wearing approved flotation gear.

Section 4. Helicopter performance plan. Each operator must complete a performance plan before each helicopter air tour flight. The performance plan must be based on the information in the Rotorcraft Flight Manual (RFM),

considering the maximum density altitude for which the operation is planned for the flight to determine the following:

(a) Maximum gross weight and center of gravity (CG) limitations for hovering in ground effect;

(b) Maximum gross weight and CG limitations for hovering out of ground effect; and,

(c) Maximum combination of weight, altitude, and temperature for which height-velocity information in the RFM. is valid.

The pilot in command (PIC) must comply with the performance plan.

Section 5. Helicopter operating limitations. Except for approach to and transition from a hover, the PIC shall operate the helicopter at a combination of height and forward speed (including hover) that would permit a safe landing in event of engine power loss, in accordance with the height-speed envelope for that helicopter under current weight and aircraft altitude.

Section 6. Minimum flight altitudes. Except when necessary for takeoff and landing, or operating in compliance with an air traffic control clearance, or as otherwise authorized by the Administrator, no person may conduct an air tour in Hawaii:

(a) Below an altitude of 1,500 feet above the surface over all areas of the State of Hawaii, and,

(b) Closer than 1,500 feet to any person or property; or,

(c) Below any altitude prescribed by federal statute or regulation.

Section 7. Passenger briefing. Before takeoff, each PIC of an air tour flight of Hawaii with a flight segment beyond the ocean shore of any island shall ensure that each passenger has been briefed on the following, in addition to requirements set forth in Sec. 91.107 or 135.117:

(a) Water ditching procedures;

(b) Use of required flotation equipment; and

(c) Emergency egress from the aircraft in event of a water landing.

Section 8. Termination date. This Special Federal Aviation Regulation expires on October 26, 1997.

Issued in Washington, DC, on September 22, 1994.

David R. Hinson,

Administrator.

[FR Doc. 94-23840 Filed 9-22-94; 11:42 am]

BILLING CODE 4910-13-M

APPENDIX E

DRAFT 6-6-94

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR parts 91 and 135

[Docket No. XXXXX; Amendment Numbers 91-XXX, 135-XXX, RIN:

Airtour Sightseeing Special Regulation – Hawaii

AGENCIES: *Federal Aviation Administration*

ACTION: Notice of Proposed Rulemaking (NPRM)

SUMMARY:

This notice proposes a ***Special Federal Aviation Regulation*** (SFAR) for Hawaii that will nullify the exception found in section 135.1(b)(2) regarding sightseeing flights that begin and end at the same airport, and are conducted within a 25-statute-mile radius of that airport. The SFAR would require *all* commercial air tour/sightseeing operators to operate under Part 135 at *all* times with special operating procedures designed to enhance safety and noise abatement. The Proposed rule defines commercial air tour sightseeing operations and sets operating conditions and limitations including weather requirements for conducting commercial airtour sightseeing flights. The terms "air tour operations and sightseeing" are defined by the rule. The FAA believes this will ensure greater safety in airtour operations when everyone who conducts air tour/sightseeing operations is meeting the requirements of Part 135 including necessary record keeping for FAA audits to determine aircraft airworthiness, flight following, crew training, pilot checking and flight and rest.

EFFECTIVE DATE: June X, 1994. Comments on this ANPRM must be received on or before [Insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC-200), Docket No.___, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. ___. Comments may be examined in Room 915G weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: XXXXX XXXXXXXXXXXXXXX, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-XXXX.

SUPPLEMENTARY INFORMATION:

Comments Invited Interested persons are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the specified closing date for comments will be considered by the Administrator before taking action on this proposed rulemaking. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the

Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. ___." The postcard will be date stamped and mailed to the commenter.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-200, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3485. Communications must identify the notice number of this NPRM. Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

BACKGROUND:

The Hawaiian Air Tour sightseeing industry has experienced rapid growth and an associated increase in the number of sightseeing accidents during the past ten years. According to a recent NTSB summary, there have been 23 fatalities since January, 1989. Most accidents have been small helicopters (19) and are attributed primarily to pilot error and aircraft maintenance, however, a contributing factor in some of the helicopter accidents is pilots operating outside of the demonstrated performance capabilities of the aircraft.

The situation is aggravated with operations conducted by non-certificated Part 91 operators who have little or no FAA oversight of aircraft maintenance, pilot training and pilot flight testing and who may not meet financial responsibilities required of Part 135 operators. Presently, Part 135 operators can chose [sic] to operate under Part 91 taking advantage of lower weather conditions and/or fly at lower altitudes and possibly avoiding pilot flight time limitations encountered in Part 135 flying.

There are approximately 36 Part 135 operators with roughly 90 helicopters and about ten airplanes dedicated to air tour/sightseeing in Hawaii. There are normally fewer than approximately ten non-certificated operators conducting commercial sightseeing flights under Part 91. The helicopters conduct low altitude hovering near scenic attractions where there is generally limited suitable terrain for recovery in event of engine power loss. Flights conducted in the Volcanoes National Park on the big island are subject to harsh operating environments with high operating temperatures when flying low over hot molten volcanic lava vents and skylights with hot sulfuric gases emitting with venting steam. Single engine helicopters are also taking passengers beyond gliding distance from the shoreline to view the hot lava falling into the ocean.

The FAA has received numerous complaints on overflight operations in Hawaiian cities and residential communities, National and State parks, wildlife refuge areas, state natural area reserves, sanctuaries and areas of significant historic value. The vast majority of scenic flights in Hawaii are conducted in small helicopters. Most complaints concerning aircraft safety and noise originate from helicopter overflights. During the past ten years 19 sightseeing accidents

have occurred in Hawaii – 15 since January, 1989; 5 this year since February 12, 1994. The latest accident involving a fatality occurred on April 18, 1994. Last year on January 25, 1993, a helicopter operating under Part 91 crashed in deep water while on an [sic] sightseeing flight to view molten lava flowing into the ocean off the coast of Volcanoes National Park on the island of Hawaii, the pilot survived, four foreign passengers were lost. The National Transportation Safety Board issued Safety Recommendation *A-93-10* to the FAA calling for special operating rules to reduce the potential for midair collisions and other accidents commensurate with weather and terrain considerations.

On April 5, 1993 the 103rd Congress, first session, accepted a proposal, H.R. 1696 drafted by Hawaiian Representative, Patsy Mink to provide for the regulation of airspace over national park system lands in Hawaii by the Federal Aviation Administration and the national Park Service, and for other purposes. H.R. 1696 calls for all flights to be conducted under Part 135 and would impose other stringent operating limitations. In May of last year Mrs. Mink conducted a meeting in Hawaii to provide citizens an opportunity to comment on problems related to H.R. 1696 in their own communities; there was overwhelming community support for the bill.

The goals of the FAA In Hawaii are to maintain public safety in aviation operations; protect wildlife sanctuaries and the natural environment that supports it from any adverse effects of aircraft operations; and reduce objectionable noise experienced by the community. The FAA has taken several steps to address the challenges faced in Hawaii. The FAA conducted a study of helicopter sightseeing operations in Hawaii in 1986. Recommendations were

made to the state and to operators in Hawaii to improve safety and community relations as a result of that study. The FAA also conducted a joint study with the state in 1986, on helicopter heliport and airport access. A result of that study was a Helicopter operating plan for Hawaii.

The Hawaiian Helicopter Operators Association (HHOA) followed some of the Helicopter Operating Plan suggestions in developing their fly neighborly program in Hawaii. The existing HHOA plan calls for voluntary compliance with standoff distances and minimum altitude over communities, sanctions are self imposed without FAA oversight. The HHOA program includes Part 91 commercial operators as well as Part 135 certificated operators.

The FAA held a series of public hearings in January, 1994, to elicit public comments and recommendations for regulatory or policy action related to overflights, including their effects on parks. There are 9 tour operators on the island of Hawaii and there are approximately 60 commercial air tours a day over the Hawaii Volcanoes National Park. At Haleakala, which was established to preserve resources in "natural condition," (39 Stat. 432, 4), there are 7 companies based on the island of Maui offering helicopter tours as well as other companies based on the other islands. On clear days, helicopters fly over the park during all hours of daylight so that helicopter noise is audible over 30 minutes of every daylight hour (personal communication, Haleakala NP). Both parks receive complaints from visitors, usually verbal, about the noise and intrusiveness of commercial air sightseeing tours. Interpretive talks, wildlife observations and censuses, ceremonies, and other normal activities are interrupted by air tour overflights. NPS recognizes that the commercial air tour industry is important to the economy of Hawaii but

also believes that it is charged with protecting the superlative resources of its national parks, including natural quiet, unimpaired.

Hawaii – Actions to Date

The majority of flights conducted by helicopter companies in Hawaii are commercial air tour/sightseeing operations. The FAA has received numerous complaints of flights over residential communities, national parks, wildlife refuge areas, state natural reserve areas, sanctuaries and areas of significant historic/cultural value. Issues raised by the growth of air tour/sightseeing activity and the associated increase in the number of flights conducted over a given area include aircraft noise, flight safety, and airport site constraints near scenic areas. Some complaints about sightseeing helicopter activity may be related to other aviation operations such as military, police, drug interdiction or other government agency activity.

The FAA has taken several steps to address the overflight issues in Hawaii. In 1986 the FAA conducted a study of helicopter sightseeing operations in Hawaii. As a result of that study recommendations were made to the State and to operators in Hawaii to improve safety and community relations. Also in 1986 the FAA conducted a joint study with the State on heliport and airport access. A result of that study was a helicopter operating plan for Hawaii. Numerous meetings have since been held with NPS personnel, industry, and the community including four public meetings conducted in January 1994.

The current Part 135 rule is difficult to enforce since there is no requirement for the Part 135 operator operating

under Part 91 or a Part 91 operator to produce appropriate records or other proof that it was operating within Part 91 rules. Operations under the current rule have no record keeping or flight and duty requirements. Commercial operators, holding themselves out to the public for compensation or hire, have the same obligation as an air carrier in fulfilling their responsibility to perform services with the highest degree of safety in the public interest, however the provisions of the Federal Aviation Regulations necessary to enforce that obligation are deficient.

Delete the exception found in § 135.1(b)(2), concerning sightseeing flights that begin and end at the same airport, and are conducted within a 25 statute mile radius of that airport. The amendment would require sightseeing operators to operate under Part 135, rather than Part 91 in accordance with current FAR provisions. The FAA believes that this rulemaking is necessary to ensure that anyone who conducts sightseeing operations in an aircraft is meeting the necessary recordkeeping for FAA audits to determine aircraft airworthiness, crew training, checking and flight and duty time compliance and the operations specifications required by Part 135 would provide a higher level of safety than is now being provided. In addition the FAA has determined that it should revise the current § 135.1(b)(5) to include an exception for gliders as well as balloons. This is necessary to prevent bringing aircraft under Part 135 that are unsuitable for operations under that part.

HAWAII AIRTOUR/SIGHTSEEING OPERATIONS

ISSUE: The Hawaiian Air Tour sightseeing industry has experienced rapid growth during the past ten years. With

that rapid growth in air tourism there has been an increasing number of aircraft accidents. The accidents are attributed primarily to pilot error, however, a contributing factor in most of the helicopter accidents is operating outside of the demonstrated performance envelope of the aircraft. The accident rate may be exacerbated by insufficient pilot training and checking in skills and knowledge associated with operating at maximum performance in harsh environments. The situation is aggravated when operations are conducted by non-certificated Part 91 operators who have little or no FAA oversight of aircraft maintenance, pilot training and pilot flight testing. The situation is also aggravated when Part 135 operators chose to operate under Part 91to take advantage of lower weather conditions and/or fly at lower altitudes and possibly to avoid pilot flight time limitations encountered in Part 135 flying. The noise from numerous overflying helicopters is also seriously aggravating local communities.

BACKGROUND: There are approximately 36 Part 135 operators with roughly 90 helicopters dedicated to air tour/sightseeing. There are also a number of air taxi Part 135 operators conducting mostly airplane sightseeing operations. In addition there are a few other operators using helicopters and/or airplanes conduct sightseeing activities over Hawaii under the general operating rules of FAR Part 91. There are times when certificate holding Part 135 operators conduct sightseeing flights under Part 91. In addition, there are commercial airline operations, military operations, law enforcement agencies and agricultural operations as well as flight training organizations, helicopter lift companies, and a host of private owners and

operators. These activities affect a diverse and complex airspace systems [sic].

The FAA has received numerous complaints on overflight operations in Hawaiian cities and residential communities, National and State parks, wildlife refuge areas, state natural area reserves, sanctuaries and areas of significant historic value. The vast majority of scenic flights in Hawaii are conducted in small helicopters. Most complaints concern aircraft noise and endangerment and originate from helicopter overflights.

During the past ten years numerous sightseeing accidents have occurred, five have occurred since (2/12/94) the latest (4/18/94) involved a fatality. On January 25, 1993, a helicopter operating under Part 91 crashed in deep water off the coast of Volcanoes National Park on the island of Hawaii, the pilot survived, four foreign national passengers were lost.

On April 5, 1993 the 103rd Congress, first session, accepted a proposal, H.R. 1696 drafted by Hawaiian representative, Patsy Mink to provide for the regulation of airspace over National Park System lands in the State of Hawaii by the Federal Aviation Administration and the national Park Service, and for other purposes. In May of last year Mrs. Mink conducted a meeting in Hawaii to provide citizens an opportunity to comment on problems related to H.R. 1696 in their own communities.

The goal of the FAA In Hawaii is to maintain public safety through safe operating practices for air tour operators; protect wildlife and the natural habitat that supports it; and reduce adverse noise experienced by the community. The FAA has taken several steps to address the challenges faced in Hawaii. In 1986 the FAA conducted a study of

helicopter sightseeing operations in Hawaii. As a result of that study recommendations were made to the state and to operators to [sic] in Hawaii to improve safety and community relations. Also in 1986 the FAA conducted a joint study with the state on helicopter heliport and airport access. A result of that study was a Helicopter operating plan for Hawaii.

Numerous meetings have been held with park service personnel, industry, and the community including four public meetings during January, 1994. Recently the FAA drafted an FAA action plan for the management of the airspace in the [sic] Hawaii. That plan includes steps to be taken immediately including voluntary agreements, and dictates more stringent actions to follow if noise and safety-related issues are not adequately abated. In March, of 1994, the FAA and the National Park service jointly issued an Advanced Notice of Proposed Rulemaking (ANPRM) concerning overflights of units of the National Park system (59 FR 12740). The ANPRM addresses overflights of Grand Canyon National Park and the parks in the state of Hawaii, with particular emphasis on overflights by commercial air tour operators.

GENERAL ISSUES:

The FAA believes that each of the following measures would have some benefit, in certain circumstances, as an effort to mitigate the noise impact of aircraft overflights of particularly noise-sensitive areas. The potential noise mitigation value of each measure is summarized. For the measures listed that have not been used by the agency before, the FAA has not concluded that such actions would meet the legal and policy considerations summarized

above, and specific comment is requested on the benefits, costs, and impacts of each.

Prohibition of flights during inclement weather, i.e., at some cost in inconvenience and lost business for air tour operators and reduced access to air tours for their passengers, the public would enjoy a virtual absence of aircraft noise in sensitive areas for specific periods.

Altitude restrictions.

Different altitudes are also specified for fixed-wing aircraft and helicopters for safety and efficiency reasons.

Generally, noise mitigation is achieved through higher minimum altitudes because the greater the slant-range distance from an aircraft to a point on the surface, the lower the sound level on the surface from aircraft noise. However, this mitigation can be offset or reversed based on attenuation factors such as hills, heavily wooded areas, and "soft ground" terrain.

FAA Authorities: The FAA has broad authority and responsibility to regulate the operation of aircraft, and to establish safety standards for and regulate the certification of airmen, aircraft, and air carriers. Federal Aviation Act of 1958, as amended (FAAct), Section 307(a) and (c); Title VI. The FAAct provides guidance to the Administrator in carrying out this responsibility. Section 104 provides to each citizen of the United States a public right of transit through the navigable airspace of the United States. Section 305 directs and authorizes the Administrator to encourage and foster the development of civil aeronautics and air commerce. Section 306 requires the Administrator, in exercising his authority, to give full consideration to the

requirements of national defense, commercial and general aviation, and to the public right of freedom of transit through the navigable airspace.

The FAA's authority is not limited to regulation for aviation safety, efficiency, and development. Subsection 307(c) of the FAAct provides that FAA air traffic rules and flight regulations may be adopted "for the protection of persons and property on the ground." The FAA considers this protection to extend to environmental values on the surface as well as to the safety of persons and property. Section 611 of the FAAct, "in order to afford present and future relief to the public health and welfare from aircraft noise," directs the Administrator to adopt regulations "as the FAA may find necessary for the control and abatement of aircraft noise," including application of such regulations to any of the various certificates issued under Title VI. Finally, it is the general policy of the Federal Government that the FAA, like other agencies, will exercise its authority in a manner that will enhance the environment, and that FAA will make a special effort to preserve the natural beauty of public park and recreation lands, wilderness areas, and wildlife refuges. Section 101 of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. Section 4321; Section 4(f) of the Department of Transportation Act, 49 U.S.C. Section 303; and Executive Order 11514, as amended by Executive Order 11991.

REGULATION AFFECTED: Section 135.1(b)(2) of the Federal Aviation Regulations (FAR) permits nonstop sightseeing flights that begin and end at the same airport and are conducted within a 25-statute-mile radius of that airport to be conducted under FAR Part 91.

THE PROPOSED RULE

In consideration of the foregoing, the Federal Aviation Administration proposes to A special Federal Aviation Regulations as follows:

PART 135 – AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

8. The authority citation for Part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421-1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

9. Section 135.1 is amended by adding a new paragraph ( ) to read as follows:

Request for Public Comment

The FAA is issuing this NPRM to gather comments on operational and economic impact for use in developing special Federal Aviation Rulemaking (SFAR).

APPENDIX F

National Transportation Safety Board

Washington, D.C. 20594

OCT 27 1994

(LOGO)

Office of the Chairman

Federal Aviation Administration
Office of the Chief Counsel
Attention: Rules Docket (AGC-200), Docket No. 27919
800 Independence Ave., S.W.
Washington, D.C. 20591

Dear Sir:

The National Transportation Safety Board has reviewed the Special Federal Aviation Regulation (SFAR) No. 71, "Air Tour Operators in the State of Hawaii," Final Rule, published in 59 FR 49138 on September 26, 1994. The following comments pertain to the subject Docket No. 27919.

National Transportation Safety Board investigations of air tour accidents since 1986 indicate that the existing regulations do not provide an adequate level of safety for air tour operations conducted within the United States. The Safety Board has held two public hearings (1986 and 1994) and as a result made numerous safety recommendations to the FAA in an attempt to define and quantify the national air tour industry and to examine air tour industry safety performance as part of a traditional flight hours-based incident/accident record. FAA actions to date have produced two SFARs that affect the air tour industry.

SFAR 50-2, originally issued in 1988, dictates special flight rules for all aircraft operating within airspace designated as the Grand Canyon National Park Special Flight Rules Area. Testimony by Grand Canyon air tour operator associations at the most recent public hearing conducted at Phoenix, Arizona, on October 11, 1994, indicated that, although there was initial operator resistance to the early FAA efforts to provide route structure and altitude restrictions for VFR air traffic in the area of the Grand Canyon National Park, the current special operating rules have resulted in a more workable and safer air operations environment in the Grand Canyon airspace. This attitude appeared to prevail among the air tour operators; in addition, SFAR 50-2 was reported to be satisfactory to transit commercial operators and general aviation airspace users. Public hearing witnesses testified that the SFAR came into being as the result of 18 months of participative discussions and negotiations between the FAA and parties concerned with the use of the Grand Canyon airspace.

The Safety Board is pleased to recognize the initiative of the FAA to improve air tour safety with the issuance on September 22, 1994, of SFAR No. 71, "Special Operating Rules for Air Tour Operators in the State of Hawaii." Several of the provisions of SFAR 71 will provide an immediate improved level of safety for the Hawaiian air tour industry. However, the Safety Board must reiterate that a permanent nationwide policy for air tour operations is appropriate to define the industry, track its performance, and ensure equal treatment regardless of the points of tourist interest or the location of the operator.

In particular, the Safety Board favorably notes that, within the State of Hawaii, the FAA now defines an air

tour operator and provides specific flotation requirements for single-engine helicopter air tour operations, and specifies added requirements for air tour passenger briefings.

During a public hearing on air tour safety conducted in Honolulu, Hawaii, on October 13-14, 1994, the Safety Board received testimony from three Hawaiian air tour company spokespersons. All three operators related that, in light of previous accidents, they considered it appropriate that each person on board their company aircraft should wear approved life preservers. The operators' opinions were supported by helicopter manufacturers' testimony based on historical experience, indicating that emergency water entry frequently results in difficult egress from an overturned aircraft. They indicate that the most beneficial item of survival equipment in this situation is an individual life preserver.

The operators and manufacturers expressed several concerns about the capabilities of airframe-mounted helicopter flotation systems to provide a reliable means of passenger and crew survival. They pointed out that an emergency water entry may easily exceed the certificated vertical speed values of current systems and result in failure of this equipment to fully perform as expected.

Therefore, the Safety Board believes that the SFAR 71 provision in Section 3, "Helicopter flotation," should be modified to provide for two redundant means of occupant survival: airframe-mounted flotation equipment *and* the wearing of a life preserver by each person while on board.

Public hearing testimony on the aspects of the SFAR 71 related to Section 5, "Helicopter operating limitations" and Section 6, "Minimum flight altitudes" was profuse.

FAA witnesses indicated that the provisions were based on a review of previous accident data and the FAA's desire to increase the possibility of a successful (noninjury) autorotation or forced landing in the event of an inflight emergency. The Safety Board believes that reasonable measures to improve the successful termination of any inflight emergency should be evaluated and adopted if appropriate. However, operator comment on the stated SFAR 71 provisions brought several complicating facts to light.

During the public hearing, the Safety Board heard the operators and manufacturers question whether helicopter operating limitations should be placed solely on air tour operators in Hawaii, while nontour operations in Hawaii and operators in other Sates remain unregulated. The Safety Board believes that the FAA should conduct further discussions with the interested parties to resolve the issue of helicopter height-velocity diagram performance and provide for an equivalent level of safety.

The element of SFAR 71 that presents the Safety Board with the most concern is Section 6, "Minimum flight altitudes." The Safety Board supports the premise of operating at an altitude no lower than that which will allow sufficient time for the pilot to select a suitable landing site and prepare the aircraft and passengers for an emergency landing. However, the Safety Board believes that the SFAR 71 provision that, "no person may conduct an air tour in Hawaii below an altitude of 1,500 feet above the surface of the State of Hawaii or closer that 1,500 feet to any person or property (or as authorized by the Administrator)," *may* present midair collision hazards or encounters with cloud layers that are more serious than the hazards of flights at lower altitudes.

Public hearing testimony in Honolulu made it obvious that the minimum height above terrain requirement of 1,500 feet will initially concentrate air tour traffic at that flight altitude. Operators should be expected to negotiate cooperative solutions to the concentration of air traffic, but their efforts need to be facilitated by the FAA. Furthermore, weather patterns around the Hawaiian islands should be a major factor in setting any minimum altitude for air tour operations. The orographic effect of changing windward and leeward air flow produces cloud formations along tour routes that must be considered when defining altitude requirements. The Safety Board believes that air traffic concentration presents a matter that must be resolved at the earliest possible time. Furthermore, based on the Safety Board's observations of recent air tour flights throughout the State or Hawaii, the Safety Board believes that weather factors, in combination with the proposed altitude restrictions, will present a serious impediment to the successful completion of air tour flights and may lead to increased operating time over water, difficult regulatory surveillance and enforcement, and could possibly lead to willful disregard for FAA flying regulations.

The Safety Board believes that the air tour operators in Hawaii are in a position to make significant contributions to the improvement of their industry similar to the way in which SFAR 50-2 was developed for the Grand Canyon. Safety Board public hearing testimony indicated that Hawaiian operators recognize that safety can be improved with modifications of flightpaths and minimum flight altitudes. It was also clear from the public hearing that the flying environment in the Grand Canyon is dissimilar, in many ways, from operations in Hawaii. The

Safety Board believes that it is imperative that the FAA conduct further discussions with the interested parties in Hawaii to resolve the issue of optimum flight altitudes for air tour operators and, at the same time, consider the negative effects of such restrictions that may result in unintended degradation of the existing level of safety.

The Safety Board is continuing its investigation of air tour operations in the United States, with emphasis on accidents in Hawaii, and appreciates the opportunity to comment on this final rule.

Sincerely,

/s/ Jim Hall
Jim Hall
Chairman

APPENDIX G

Honolulu Flight Standards
Office
Field Office
Western-Pacific Region

[LOGO]
U.S. Department
of Transportation

**Federal Aviation
Administration**

Honolulu International Airport
135 Nakolo Place
Honolulu HI 96819-1845
Telephone: (808) 837-8300
FAX: (808) 837-8389

November 4, 1994

Safari Aviation, Inc.
P.O. Box 1941
Lihue, HI 96766

Gentlemen:

We have given careful consideration to your request for deviation from specified sections of Special Federal Aviation Regulation (SFAR) 71. We have determined that the request for deviation dated October 23, 1994, if granted, would not be in the public interest. Therefore, your request for deviation is denied in that it does not contain sufficient information. The following information is provided for your reference in the event you wish to reapply.

Air tour operators in the state of Hawaii are required to operate in accordance with the provisions of applicable Federal Aviation Regulations which now includes the additional provisions of SFAR 71 which became effective October 26, 1994.

While operators are required to operate under the new rule when conducting air tour operations in the State of

Hawaii, Operators may request deviations from certain provisions of the SFAR pertaining to Section 6, Minimum Flight Altitudes. Deviations of this section will be processed by the Honolulu Flight Standards District Office (FSDO). Recommendations made as a result of the FSDO review will be acted upon by the Air Carrier Division (AFS-250) of the Flight Standards Service in Washington, D.C.

This information is provided to operators conducting air tours in the State of Hawaii for the purpose of clarification of the operations requirements of the SFAR for which a deviation may be requested and the form and manner in which such a request must be presented to the Administrator.

The Administrator may authorize a deviation from the minimum altitude requirement for operations conducted during VFR air tour operations. Such deviations from the required minimum altitude of 1500' AGL may be reduced for operators to an operating altitude no lower than 500' AGL if the operator can show a specific need for such an operating altitude and can demonstrate that an equivalent level of safety for operations to be conducted at those altitudes, can be maintained.

In order to minimize the amount of time required to process the operator's deviation requests, the Honolulu FSDO requests the operators to submit the following information in its entirety as a package. This in turn will eliminate the required telephone call-backs for clarification of certain items or requests for additional information.

An operator requesting a deviation from Section 6 of the SFAR should keep the following in mind when preparing the deviation request.

- No deviation will be granted for operations to be conducted below 500' AGL.
- No deviation will be authorized for the purpose of reducing weather minimums. Conditions and limitations will include weather minima equivalent to that required for flight at 1500' AGL.
- No deviation request will be granted for sections of the SFAR other than for Section 6(a) and 6(b).
- Deviation requests which include visibility minima shall not be approved for flights with visibility less than 1½ miles. Cruise speeds will be operationally reduced by the use of Operations Specifications during periods of reduced visibility operations.

All deviation requests must be operator specific. Any request to be processed must include the following information:

operator's name and business address,

certificate number,

type of aircraft to be used during the deviation,

pilot authorizations required,

training program changes necessary to provide adequate training in the operation during deviation from normal operating altitudes,

changes to the training program,

and proposed changes to the operations manual.

A deviation request must include the proposed route segment or specific site at which the altitude deviation is requested. The route segment or specific site must show or describe:

the boundaries of the route,

altitudes to be flown,

emergency landing areas,

and verbal discussion of the attainment of an equivalent level of safety.

Under no circumstances will deviations be authorized which allow an operator to fly an entire tour at lower than standard altitudes required by SFAR 71.

The operator's request for deviation should include maps, photos, or other descriptions of the route segment or site for lower than standard altitudes requested. The documentation should be clearly marked and the verbal description should be concise and accurate.

Material and information provided by the operator will be incorporated by reference in the operations specifications issued to the operator and subject to amendment or revision as appropriate.

Operators who utilize aircraft with small registration markings should be prepared to affix large registration numbers or other authorized markings on the belly of the helicopter for easier identification from the ground. These markings must be approved by the Administrator.

If you have any questions regarding this letter, please contact your Principal Operations Inspector at (808) 837-8300. If you wish to submit another request for deviation,

based on the information provided above, you may do so by submitting two copies to your assigned Principal Operations Inspector.

Sincerely,

/s/ Peter E. Beckner
Peter E. Beckner
Manager

APPENDIX H

[LOGO]
U.S. Department of Transportation

Federal Aviation Administration

Office of the Administrator

800 Independence Ave., S.W.
Washington, D.C. 20591

Dec. 13, 1995

The Honorable Daniel K. Inouye
United States Senate
Washington, DC 20510-1102

Dear Senator Inouye:

Thank you for your letter and the letter from Mr. Scott Shupe, Mauna Kea Helicopters, Inc., requesting the status of the Federal Aviation Administration's (FAA) efforts to revise Special Federal Aviation Regulation (SFAR) 71. I share your concern for the protection of Hawaii's residents and visitors. Before I address the safety and financial information you provided, I will report on the status of the rule and deviations granted.

We are developing responses to the approximately 100 formal comments we received on the SFAR. After analyzing those comments and the input from all relevant sources, including the recommendations of the National Transportation Safety Board (NTSB), the rulemaking team will make appropriate changes to SFAR 71. The rulemaking team will address many of the issues you raise, including compression of traffic because of the altitude limitation and whether a lower altitude may be used safely in certain regions of Hawaii. We anticipate finalizing that rulemaking project in the near future.

The altitude of 1,500 feet in the SFAR was selected on the basis of safety, and the complete rationale was detailed in

the preamble to the SFAR. Since the implementation of the SFAR, the FAA has granted an altitude deviation of 1,000 feet to approximately 20 operators. In addition, the FAA recently granted several operators an altitude deviation of 500 feet for multiengine helicopters. All of the deviations are closely scrutinized by the FAA and require a finding of an equivalent level of safety. For example, we have limited these deviations to specific sites that are not near congested areas.

My staff has provided me with the data concerning near midair collision (NMAC) reports for Hawaii. Often the pilot of each aircraft involved in a NMAC files a separate report. Since the effective date of the SFAR, there have been 16 NMAC's with 31 reports filed for those NMAC's. Of the NMAC reports, one involved a large commercial fixed-wing aircraft and one involved a military helicopter. The rest of the NMAC reports involved small helicopters of the type used by the air tour operators.

From January 1989 through the effective date of the SFAR (October 26, 1994), 23 NMAC reports for Hawaii were filed. Most of the NMAC reports that were filed immediately after publication of the SFAR appeared to be in reaction to the implementation of the new rule. The FAA considers every NMAC report important, and the Flight Standards Service (AFS) investigated each and every one of those NMAC reports. Of the 16 NMAC's that occurred after the effective date of the SFAR, AFS determined that only 2 had validity. Additionally, a review of those NMAC reports shows that of the 16 NMAC's, two pilots were responsible for filing reports for 5 NMAC's.

As with any rule, the FAA developed an economic analysis of the affect of the SFAR on the air tour industry. The

FAA is aware that the SFAR has had some impact. Although the FAA is sympathetic to any economic impact that the SFAR is having on the air tour industry in Hawaii, we are mindful that safety is the primary reason for the SFAR. Between July 1991 and July 1994, there were 20 air tour accidents involving 24 deaths. Since implementation of the SFAR, there has been only one accident and no fatalities. That accident involved an engine failure that resulted in four minor injuries. We have continued the open, informal dialogue with individual operators in Hawaii and do not believe there is a need for formal meetings.

If I can be of further assistance, please contact me or Mr. A. Bradley Mims, Assistant Administrator for Government and Industry Affairs, at (202) 267-3277.

Sincerely,

/s/ David Hinson
David R. Hinson
Administrator

Enclosure
Transmitted Correspondence

APPENDIX I

David R. Hinson
Administrator
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

December 26, 1995

We, the undersigned professional pilots, are compelled to advise you of a critical situation created by SFAR 71 and to plead with you personally to get section six revised regarding altitude and stand-off distance. The regulating effect of section six contradicts a long standing FAA precedent of advised separation criteria between fixed and rotary wing aircraft. Effectively regulating helicopters to the same altitude and airspace as fixed wing, this regulation has already caused a number of near miss occurrences between airplanes and helicopters. To date we have never had a tragic midair collision in Hawaii. Do we need to have a major catastrophe here before the FAA believes the seriousness of the situation?

Our industry has worked with the FAA operational staff in Washington D.C. on this issue through lengthy discussions including first hand flight analysis of the concerned areas. We ask that you confer directly with those particular people who have actually flown with us on our tours on each island. We thought that a major improvement to this problem had been worked out between us this past August but the proposal was ultimately denied by 'higher-ups'. We don't know who these people are or on what they based their judgments but it certainly wasn't from interaction with us or the reality of this situation. Have political considerations now taken precedent over safety concerns?

We are left bewildered at the lack of responsiveness of the FAA to our concerns and professional judgment. The virtual total spurning by the FAA of the input that we have given so far in this regulatory process has caused a substantial loss of faith and trust between us. We are some of the most experienced helicopter pilots in the world, who fly helicopters here every day. We deserve serious input into the safety regulations with which we are professionally bound to comply.

We respectfully plead with you to lower the minimum altitude prescribed in section six to 500 feet for helicopters. This will ensure us of a five hundred foot separation from fixed-wing traffic. As we are now regulated to the centerline of many valleys we further request that the stand-off distance be reduced to 300 feet. This will allow us a safer horizontal separation between inbound and outbound transitions in scenic valleys. We ask to operate at this lower altitude and stand-off distance only in appropriately designated, unpopulated areas.

Thank You for your consideration,

Name	Signature	Certificate number	Helicopter hours logged

The undersigned 53 professional helicopter pilots from the State of Hawaii, representing over 530,000 hours of logged helicopter flight experience.

Pilot signatures for letter to Mr. Hinson dated 12-26-95

	CERT.	HELICOPTER
/s/ Gene Perry	NUMBER	HOURS LOGGED
Gene Perry	1638374	11,500

/s/ Fred J. Adlard		
Fred Adlard	2043388	11,400
David Chevalier	2080648	10,000
/s/ David J. Chevalier		
Steve Slade	558298405	10,000
/s/ Steve O. Slade		
Daryl Evans	562028366	10,000
/s/ Daryl Evans		
Ronald Evans	1444253	9,950
/s/ Patrick F. Boyle		
Patrick Boyle	2464666	9,500
/s/ William Payne		
William Payne	2004234	8,500
/s/ Thomas L. Allen		
Thomas Allen	526886655	7,200
/s/ Timothy Rory Gaffney		
Timothy Gaffney	154501806	6,850
/s/ Paul Daryl		
Paul Daryl	57568009	6,500
Charlie Duke	4097767164	5,600
/s/ Charlie Duke		
Joeseph Phelps	483767164	5,600
/s/ Joeseph Phelps		
Roger Srouji	565535245	5,320
/s/ Roger Srouji		
Steve Gould	571558584	5,310
/s/ Steven Gould		
Richard Potts	467310014	5,310

/s/ Richard Potts		
Daniel Brown	5614116455	5,000
/s/ Daniel J. Brown		
Bruce Mays	2230926	4,500
/s/ Robin E. Wallace		
Robin Wallace	548434278	3,700
/s/ David Wilson		
David Wilson	576769849	3,500
/s/ Richard Olsten		
Richard Olsten	2187263	3,200
/s/ Curtis W. Loftsted, Jr.		
Kurt Loftsted	1760534	23,000
/s/ Will Squire		
Will Squire	1920305	21,000
/s/ Dave McGuff		
Dave McGuff	2145221	18,700
/s/ Frank Ochipinti		
Frank Ochipinti	1619727	16,950
/s/ Eric Lincoln		
Eric Lincoln	2136543	15,000
/s/ Keith Taylor		
Keith Taylor	511542567	15,000
/s/ Scott Schupe		
Scott Schupe	2065719	14,700
/s/ Donn Rasmussen		
Donn Rasmussen	2087385	14,500
/s/ Ralph Dwyer		
Ralph Dwyer	1808884	14,115
/s/ Richard Russell		
Richard Russell	521801697	13,975

/s/ Ross Scott		
Ross Scott	1963342	13,700
/s/ Chris Reed		
Chris Reed	554824543	13,085
Steve Egger	1957602	13,000
/s/ Steve Egger		
Charles Benson	535426237	13,000
/s/ Paul Morris		
Paul Morris	277444265	12,800
/s/ Lowell Ching		
Lowell Ching	575485506	12,500
/s/ James Poulson		
James Poulson	456925810	12,200
/s/ Joe Parr		
Joe Parr	1990147	12,100
/s/ Bogart Kealoha		
Bogart Kealoha	2175764	12,000
/s/ Joseph Song		
Joseph Song	575907948	12,000
/s/ Dave Hoadley		
Dave Hoadley	56987057	11,500
Dale Allen	242195555	2,500
/s/ David Fernandez		
David Fernandez	560779648	1,200
/s/ Bill Eichengberger		
Bill Eichengberger	210407348	6,000
/s/ Tim Murray		
Tim Murray	377460911	18,000

/s/ Mark Seigel		
Mark Seigel	565117662	6,000
/s/ Roger Olson		
Roger Olson	16888111	11,000
/s/ Jim Cardin		
Jim Cardin	2048127	12,000
Michael J. Burns	558923968	1,000
/s/ Michael J. Burns		
Alan Ruiz	558543625	6,000
/s/ Adolpho J. Ruiz		
Dave Ryan	401829828	7,000
/s/ [Illegible]		
Richard C. Macahan	573584184	10,600
/s/ Richard C. Macahan		

Fifty-three Professional Pilots with over 530,000 hours of helicopter flight experience.

cc: Senator Daniel K. Inouye
James E. Hall, Chairman,
National Transportation Safety Board
Frank Jensen, President,
Helicopter Association International
Dan Anderson, President,
United States Air Tour Association

APPENDIX J

National Transportation Safety Board

Washington, D.C. 20594

JAN 26 1996

(LOGO)

Office of the Chairman

Honorable David R. Hinson
Administrator
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Dear Mr. Hinson:

Earlier this month I visited the State of Hawaii to address the American Association of Airport Executives. During this trip, I was also able to follow up on other safety-related activities in the State, specifically, those related to the air tour industry. As you know, there has been considerable reaction to the National Transportation Safety Board's public hearing at Honolulu in 1994 and its published study on the safety of the air tour industry. There has also been considerable reaction to the Federal Aviation Administration's (FAA) anticipated revision to Special Federal Aviation Regulation (SFAR) No. 71, "Air Tour Operators in the State of Hawaii."

Please allow me to share with you some concerns that the Safety Board continues to have regarding the air tour industry, particularly in the State of Hawaii. It has been more than a year since SFAR 71 was published for comment; the Safety Board provided comments to this rule on October 27, 1995. The Board continues to believe that

SFAR 71, however well-intentioned, presents an aviation safety issue, specifically Section 6, "Minimum Flight Altitudes" (1,500 feet above the surface and 1,500 feet standoff distance).

My firsthand visit tells me that this rule has adversely affected the Hawaiian air tour industry to a far greater degree than anticipated. The rule does not take into consideration the impact of local weather conditions on the available airspace for air tour operations, which has been a serious impediment to the industry. I have flown with the operators, and I held discussions with their management personnel. They explained that the concentration of air traffic now forced into a compressed flight environment along the coastal area is the result of the unique weather pattern of the islands and the minimum altitude requirements of SFAR 71.

During our discussions and again during my observation of their air operations, the operators explained that, on designated tour routes, when confronted with a possible emergency, helicopter pilots are confident that they can select a suitable landing site and effect an emergency landing from flight altitudes of 500 feet above the terrain.

In June 1995, Safety Board staff were briefed by the Helicopter Association International's (HAI) Helicopter Operators Tour Operations Safety Subcommittee on TOPS (Tour Operations Safety) program. Now that I have visited the State and personally experienced some of the air tour issues, I concur with our staff's view that many of the specifications in the TOPS program accurately reflect the needs of the nationwide tour industry, including those operators in the State of Hawaii. I have enclosed a draft copy of the briefing outline for your information.

The main premise of the TOPS program is to involve company management in the safety effort to enforce appropriate tour standards. Those standards include such things as:

- Minimum of 1 mile visibility
- Minimum en route altitude of 500 feet above ground level
- Angle of bank not more than 30°
- Angle of pitch not more than ten 10°
- Smooth transitions into each flight maneuver or flight profile
- Avoidance of the height-velocity curve, except for ground effect hover necessary for landings and takeoffs
- Aeronautical decisionmaking and crew resource management training
- Aircraft instrumentation per 14 CFR 135.159 for night visual flight rules
- Higher standards for maintenance and ground support programs

The Safety Board believes that the air tour operators are prepared to significantly contribute to the improvement of their industry if given the opportunity. The Board also believes that standards put forth in the TOPS program are reasonable and that the minimum altitude provision, and perhaps others, can be applied immediately as a basis for the revision of SFAR 71.

I recently spoke with Dave Harrington of the FAA's Flight Standards Service on the subject of the Hawaiian air tour industry. May I please take this opportunity to encourage you and Mr. Harrington to move forward on both the anticipated SFAR 71 revision and on the development of a nationwide policy for air tour operations. To further delay action on this issue will perpetuate the

mistrust and strained communications between the FAA and the air tour operators and, more importantly, continue the negative effects of the concentration of air traffic in Hawaii that result in an unintended degradation of the existing level of safety.

Sincerely,

/s/ Jim Hall
Jim Hall
Chairman

Enclosure

FILE COPY

B050. Authorized Areas of En Route Operations, Limitations, and Provisions

HQ Control: 09/12/97
HQ Revision: 020

a. The certificate holder is authorized to conduct en route operations in the areas of en route operation specified in this paragraph. The certificate holder shall conduct all en route operations in accordance with the provisions of the paragraphs referenced for each area of en route operation. The certificate holder shall not conduct any en route operation under these operations specifications unless those operations are conducted within the areas of en route operation authorized by this paragraph.

Authorized Areas of En Route Operation	Reference Paragraphs	Note Reference #
THE STATE OF HAWAII.	B31	NOTE 1, 2 AND 3

b. The certificate holder shall conduct all en route operations in accordance with the following limitations, provisions, and special requirements referenced numerically for each area of en route operation listed in subparagraph a. above.

Note Reference #	Limitations, Provisions, and Special Requirements
NOTE 1	NOT TO EXCEED A DISTANCE OF FIFTY NAUTICAL MILES FROM THE SHORELINE OF ONE OF THE MAJOR ISLANDS - NIIHAU, KAUAI, OAHU, MOLOKAI, LANAI, KAHOOLAWE AND MAUI, HAWAII.
NOTE 2	UNLESS IT IS NECESSARY FOR TAKEOFF OR LANDING, CARRIAGE OF PASSENGERS WITH A HELICOPTER OVER WATER IS PROHIBITED UNLESS THE HELICOPTER IS OPERATED AT AN ALTITUDE THAT WOULD ALLOW IT TO REACH LAND AND A SUITABLE FORCED LANDING AREA, IN THE CASE OF AN ENGINE FAILURE, UNLESS IT IS EQUIPPED WITH FAA APPROVED HELICOPTER FLOTATION DEVICES.
NOTE 3	SPECIAL AIR TOUR ROUTES: SAFARI AVIATION, INC. MAY CONDUCT TOUR FLIGHTS IN ACCORDANCE WITH THE FAA APPROVED DEVIATION TO SFAR 71 ONLY ALONG THE ROUTES OR AT SITES AS DESCRIBED IN THE FAA ACCEPTED APPENDIX TO THE COMPANY OPERATIONS MANUAL. AREAS OF AUTHORIZATION FOR DEVIATION MAY NOT BE REVISED EXCEPT BY AMENDMENT TO THE APPENDIX AND FAA ACCEPTANCE. IN ADDITION TO FAA APPROVED AREAS OF OPERATION THE FOLLOWING CONDITIONS MUST BE MET WHILE CONDUCTING OPERATIONS UNDER THE FAA APPROVED DEVIATION TO SFAR 71: FOR ALL ROUTES AND SITES: A. CONDUCT FLIGHTS NO LOWER THAN *1,000 FEET AGL. B. CONDUCT FLIGHTS AT LEAST 500 FEET BELOW CLOUDS. C. CONDUCT FLIGHTS WITH AT LEAST 3 MILES VISIBILITY. D. FLIGHTS MUST REMAIN WITHIN 1/2 MILE EITHER SIDE OF THE CENTERLINE OF THE APPROVED ROUTE AND/OR WITHIN 1/2 MILE RADIUS OF THE APPROVED SITE LOCATION. E. FLIGHTS MUST MAINTAIN A HORIZONTAL STANDOFF DISTANCE OF 500 FEET FROM RAW TERRAIN ONLY AND 1,500 FEET FROM ALL PERSONS, STRUCTURES, VEHICLES AND VESSELS.

BEST AVAILABLE COPY

FILE COPY

U.S. Department of Transportation
Federal Aviation Administration

Operations Specifications

Form Approved
OMB No. 2120-00028

Note Reference #	Limitations, Provisions, and Special Requirements
	F. ALL FLIGHTS CONDUCTED UNDER THIS SFAR 71 DEVIATION SHALL BE FLOWN BY PILOT WHO HAVE COMPLETED TRAINING IN ACCORDANCE WITH THE PROVISIONS OF SFAR 71. EACH APPROVED PILOT MUST HAVE PASSED A FLIGHT CHECK GIVEN BY THE ADMINISTRATOR OR HIS DESIGNEE ON EACH APPROVED ROUTE AND AT EACH SITE DEMONSTRATING KNOWLEDGE OF THE INGRESS, EGRESS, CALL OUT CHECK POINTS AND FORCED LANDING AREAS AT EACH SITE AND ALONG EACH ROUTE. G. OPERATORS WILL PARTICIPATE IN OR CONDUCT ONE FORMAL AIR-TOUR SAFETY MEETING PER YEAR TO DISCUSS SAFETY TRENDS. H. AIRCRAFT OPERATING UNDER THIS DEVIATION WILL DISPLAY 12" HIGH REGISTRATION MARKINGS AND/OR MARKINGS APPROVED BY THE HONOLULU FAA FLIGHT STANDARDS DISTRICT OFFICE. I. THIS AUTHORIZATION IS APPLICABLE ONLY FROM SUNRISE TO SUNSET. J. THIS AUTHORIZATION MAY BE CANCELED IMMEDIATELY FOR NON-COMPLIANCE OF ONE OR MORE OF THE ABOVE STATED CONDITIONS. *SPECIFIC LOW ALTITUDE SITES: SPECIFIC SITES WILL BE NOTED IN THE OPERATIONS MANUAL SFAR APPENDIX AT LOW ALTITUDE SITES. AT THESE SITES, INCLUDING RIDGE CROSSING POINTS, THE OPERATOR MAY CONDUCT FLIGHTS DOWN TO 500 FEET AGL WITHIN POWER OFF GLIDING DISTANCE OF THE APPROVED FORCED LANDING AREA AT THAT SITE.

K-2

1. Issued by the Federal Aviation Administration.
2. These Operations Specifications are approved by direction of the Administrator.

WELLER, JEFFREY T. — Principal Inspector — WP13

3. Date Approval is effective: 10/30/97 — Amendment Number: 2
4. I hereby accept and receive the Operations Specifications in this paragraph.

MYERS, PRESTON S. — General Manager — Date: 10/30/95

APPENDIX L

Docket No. 27919; Special Federal Aviation Regulation (S.F.A.R. 71) Comments of David Glenn Bettencourt, personally and on behalf of Safari Aviation, Inc., dba Safari Helicopter Tours

I am an aviation attorney practicing law primarily on the Island of Oahu and Kauai, Hawaii. My office is located in Suite 425 Dillingham Transportation Building, Grosvenor Center, Honolulu, Hawaii 96813. I am a pilot, and owner of two vintage aircraft; I am also a litigant often involved with the rulemaking and adjudicative arms (tentacles?) of the Administrator. Safari Aviation, Inc., dba Safari Helicopter Tours, is a Part 135 turbine helicopter tour operator with operations on the Island of Kauai and Hawaii. Safari Aviation, Inc., has at all times subsequent to promulgation of S.R.A.R.* 71 sought to convince the Administrator that safety in aviation is being seriously compromised by all aspects of S.R.A.R. 71, but has failed to do so before two S.R.A.R. 71-induced tragedies.

In the last two years, the imprudent and unjustified specifications within S.R.A.R. 71 have claimed the lives of thirteen person [sic] in two fatal helicopter accidents; both the 25 June 1999 Ohana Aviation accident [NTSB No. LAX98FA211; pilot and 5 pax dead] at Mount Waialeale, Kauai, and the 21 June 2000 Blue Hawaiian Helicopter accident [NTSB No. LAX00MA273; pilot and 6 pax dead] at Iao Valley, Maui, involved controlled flight into terrain (CFIT) in humid tropical misting/rain conditions from S.R.A.R. 71-mandated altitudes. Although the NTSB has not issued its conclusions in either case, and has reportedly

* [Should have been S.F.A.R. throughout.]

even refused to assess the human factors/S.R.A.R. 71 components of causation, numerous aviation professionals familiar with Hawaii operational conditions, S.R.A.R. 71 undercover "sting" enforcement practices and tour pilot morale agree that the counter-intuitive requirements of S.R.A.R. 71 lead [sic] to these thirteen deaths.

The Honolulu Flight Standards District Office (F.S.D.O) engages in undercover enforcement of the altitude restrictions with no regard for adverse impact of overall safety, with the simplistic view that "higher is better." S.F.A.R. 71 remains a threat to tour aircraft safety in Hawaii; every tour helicopter pilot fears this method of enforcement, unique to Hawaii, as it could unfairly end a career in aviation, and many excellent pilots simply refuse employment in Hawaii for that reason. Prior to these two accidents, numerous pilots had been violated by an [sic] FAA. enforcement program which involved stationing newly-hired "Inspectors" at the base of Waialeale to "violate" any pilot who strays closer than the magic figure of 1,500 feet to the ground; the F.A.A. even sought extra harsh sanctions against pilots who criticized S.F.A.R. 71 on safety grounds.

Pilot Chuck Lowe would have never have lost his visual reference to the ground and suffered a "white out" inside a cloud had he not feared unfair but politically-correct F.A.A. enforcement; he simply would have exercised his judgment to proceed lower but with visual reference to the ground, as he could have done in any other state. The National Transportation Safety Board report will be released in a few months, and no doubt will conclude, as did your article, that the pilot became "lost and disoriented in a cloud", which of course is contrary to the basic visual flight regulations (VFR). N.T.S.B. Investigator Wayne Pollack has not sought the input of any human factors investigators, and surely will not properly

lay the blame at the feet of another government agency when it is far easier to blame a dead pilot for "pilot error."

The N.P.R.M. fails to even mention either the Mount Waialeale or the Iao Valley accidents, and does a disservice to helicopter pilots statewide by failing to make any critical inquiry into the role that the F.A.A.'s politically-inspired but ill-conceived "environmental" regulation had by imparting conflicting demands on the pilots which directly resulted in these tragedies. Mount Waialeale is a known locale of ground-based F.A.A. observers and equipment to spot S.R.A.R. 71 altitude or stand-off violations; the subsequent certificate actions can be career-ending, a [sic] though always on a pilot's mind. Had the pilot at Mount Waialeale, Mr. Chuck Lowe [a well-trained, competent and careful pilot] been allowed the same operational freedom to rely upon his own professional judgment as pilot in command that the F.A.A. expects from helicopter pilots in the all [sic] other 49 states, this tragedy would not have occurred.

As a pilot who has flown the same route and ground track as the doomed flight a year ago attempting to recreate the last moments of that flight, I know only too well the conflicting demands which S.F.A.R. 71 needlessly inflicted on Airman Lowe and other pilots, forcing them to ameliorate [sic] their concern for the highest standard of safety in order to avoid being targeted by the F.A.A. for enforcement in the name of political correctness. While the F.A.A. continues to fault pilot decision-making, in this type of CFIT accident, their regulatory stance, dictated by their legal counsel, will continue to cost lives. The F.A.A. has destroyed pilot respect for its regulatory authority and judgment by politically-correct and abusive enforcement

tactics, which itself could impact aviation safety in the future.

Although less is known about the Iao Valley accident, others who flew in the area at approximately the same time have confirmed that an adequate (but non S.R.A.R. 71 legal) path existed into the rear of the valley; in addition, S.R.A.R. 71 requirements prevented the pilot from providing a quality tour along an alternate route if weather foreclosed the primary routing. The operational freedom normally associated with commercial helicopter operations elsewhere but denied to Hawaii tour pilots was a major contributing factor in [sic] Iao Valley accident, but the F.A.A. is incapable of any rational analysis which might expose it own [sic] culpability in those deaths. Instead, it has chosen to blame the "clear of cloud" deviation authority it issued and has now unilaterally rescinded any Operations Specifications (OpSpecs) for those limited number of operators [including Safari) which had earned them.

Hawaii tour helicopter pilots have achieved an excellent safety record despite State of Hawaii harassment and neglect (including lack of fair and adequate infrastructure for safe maintenance and operations); although the F.A.A. essentially holds helicopter tour operators to the same standards as the airlines, it has failed to insure that they are provided equal facilities to encourage stable, safety-conscious operations. The Hawaii Helicopter Operators Association (H.H.O.A.], representing nearly all tour operators in opposing S.F.A.R. 71 in 1994, provided detailed comments and objections to the Administrator which go unanswered to this day. The purported discussion of comments, 62 F.R. 58856-58859 [October 30, 1997], was general and deficient at best. The present N.P.R.M. almost concedes that fact by defending the continued

extension of S.R.A.R. 71, on the purported continued need for additional time to discuss those same comments raising concerns about the present rule. The NPRM states:

> Since the F.A.A. believes that S.R.A.R. 71 has been successful in preventing further accidents, the F.A.A. is developing a national air tour safety rule that would address similar issues identified in S.R.A.R. 71. Once that rulemaking is complete, this national rule would replace S.R.A.R. 71, which would then be rescinded.
>
> This proposal would extend S.R.A.R. 71 for an additional 3 years. As stated in the extension of S.R.A.R. 71, the F.A.A. intends to issue a notice of proposed rulemaking applicable to all air tour operators concerning air tour safety. *This national rule will be responsive to NTSB comments and will consider issues raised by commenters who responded to S.R.A.R. 71 in 1994.*

65 F.R. at 51513 [August 23, 2000; emphasis added]

All Federal Register Notices/Final Rules regarding S.F.A.R. 71 have deliberately mixed [both in the air and in their statistical-babble) highly-divergent types of aircraft operations; modern turbine-powered tour helicopters and aging if not elderly piston powered fixed wing twins. The reason is obvious and has been documented by the H.H.O.A.; the F.A.A. needed several serious fixed-wing accident fatalities and causational factors to bolster its statistics. The F.A.A. also relied on several 1993-1994 turbine helicopter accidents caused by the failure of a poorly designed and inappropriately certified engine, the Lycoming LTS 101, which is no longer in use in any tour aircraft in Hawaii.

When S.F.A.R. 71, which applies only in Hawaii, was promulgated by the F.A.A. as an "emergency" regulation in 1994, it had the immediate effect of concentrating a dangerous mix of fixed-wing and helicopter aircraft at the same altitudes; the F.A.A. responded to safety concerns expressed by N.T.S.B. chairman Jim Hall making limited modifications to these altitude requirements. Knowledgeable pilots who understand the complex human factors which induce pilot error knew that S.F.A.R. 71 would someday claim lives. The Clinton administration, encouraged by Hawaii's congressional delegation, refuses to recognize that they were and are correct.

To those such as myself who were introduced to aviation safely and efficiently through the use of carefully developed and refined instructional practices developed in partnership with the F.A.A., the F.A.A.'s recent reliance on spurious science and faulty regulatory procedures to rationalize the politically-correct [but camouflaged] agenda of non-aviation [and even non-F.A.A.] entities is extremely discouraging. The simulated "emergency" utilized by the F.A.A. its original promulgation of S.F.A.R. 71 without any form of advance notice or even informal consultation with the limited group of Hawaii operators, relied on irrelevant fixed-wing accidents and helicopter operations which violated existing regulations. It also utilized the false statistical premise that two closely-spaced helicopter accidents represented a "trend", which would thereafter "improve" due to the regulatory intervention; as they say, figure [sic] don't lie but liars figure.

S.F.A.R. 71 and its recently announced rejuvenation by the Administrator's army of attorneys, represents government regulatory conduct at its worst, the greatest present threat to safety in aviation in Hawaii, and the

eternal proof that absolute power corrupts absolutely. S.F.A.R. 71, rather than being a safety rule, is far more concerned with the addressing political concerns of Hawaii's congressional delegation and concentration of unassailable regulatory power in "enforcement" actions. The F.A.A. has steadfastly refused to discuss in any meaningful detail the comments it received after the initial promulgation of S.F.A.R. 71. See, 62 F.R. 58856-58859 [October 30, 1997].

The inherent defects numerous pilots, operators and safety consultants have identified in S.F.A.R. 71 are the predominant reason why the uniform commercial air tour safety rule NPRM has yet to be issued, despite more than six years of secret meetings within the F.A.A. and with outside entities such as congressional staffers, the Office of the Secretary of the Department of Transportation, and environmental activists. Encouraging, the present N.P.R.M apparently recognized the validly [sic] of at least of [sic] Safari Aviation's procedure objections to S.F.A.R. 71 by now specifying that:

> All comments received, ***as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking***, will be filed in the docket. The docket is available for public inspection before and after the comments closing date.

66 F.R. at 51512. Although this may generate a meaningful record of the F.A.A.'s ex-parte contact not publicly known or revealed in prior SFAR 71 rulemaking, the damages from secret ex-parte contacts has already been done. In addition, the F.A.A. N.P.R.M. does nothing to disassemble the secret internal F.A.A. review system and documentation which is in reality the only true administrative record for

this form of rulemaking. Only a fool or an optimist would realistically believe that the F.A.A. will consider comments from the industry and public after its own internal rulemaking process and debate has finalized the language of the rules prior to the N.P.R.M.

I have been involved in flight safety for more than thirty years, both professionally and as one of the founders of hang-gliding clubs within the State of Hawaii which united somewhat spirited pilots into an [sic] local organization dedicated to promoting proper training, safe flying practices and respect for other airspace users. This was accomplished only by working closely with F.A.A. employees [Hawaii was a region then) who were genuinely dedicated to promoting safety in aviation.

I have taken an extreme interest in S.F.A.R. No. 71 for several reasons, not the least of which is that it endangers my life every time I operate my aircraft here in Hawaii. My other interests in this regulatory pronouncement and its enforcement by the local SFDO stem from my lengthy participation in and litigation against longstanding efforts by the State of Hawaii to regulate and limit helicopter and several other forms of aircraft operations authorized by federal law. I have also represented the Hawaii Helicopter Operators Association and Safari Aviation, Inc., in their efforts to eliminate the dangerous, arbitrary and capricious aspects of S.F.A.R. 71.

Multiple, diverse and knowledgeable sources have repeatedly warned the Administrator that S.F.A.R. 71 and her draconian enforcement tactics would be deleterious to aviation safety, and they have been proved correct. My past litigation against the Administrator's attempts to evade statutory rule-making procedural protections for

public input and comment require me to document the corrupt practices by which S.F.A.R. 71 was initiated, defended and expanded. Almost no aspect of government conduct during the late Clinton administration is more dangerous to the fundamental rights of citizens that [sic] the on-going efforts to eliminate any meaningful public input to divisive governmental action.

Recent arbitrary and unilateral conduct of the Administrator following the Iao Valley accident has emphasized that the true purpose of S.F.A.R. 71 was to consolidate within the F.A.A. Absolute power to destroy an operator at will. During the initial legal challenge to S.F.A.R. 71 in 1994-1995, the F.A.A.'s Washington headquarters (read, "General Counsel") refused to authorize any deviations even after numerous operators, pilots and even Chairman Jim Hall of the N.T.S.B. raised serious mid-air collision safety concerns. During this time, Safari Aviation nearly suffered a mid-air collision with a fixed-wing twin in the vicinity of Kilauea Crater on 25 October 1995. The F.A.A. still withheld deviations due to the existence of the continued legal challenge to S.F.A.R. 71.

When various levels of deviation authority were finally granted, they were premised on being incorporated into Part 135 OpSpecs; the F.A.A. used this deviation authority to force Part 91 operators to become Part 135 Operators. At the present time the Honolulu F.S.D.O has [without notice or hearing] revoked its previously-granted deviation authority for several operators, and has demanded that all contractually agree to the future imposition of OpSpec-based sanctions on all operator [sic] where a pilot is merely alleged to have violated S.F.A.R. 71, even when no certificate action is filed against the pilot. Any operator who does no [sic] agree to this procedure will

suffer the revocation of all existing OpSpecs. As the documents produced pursuant to Safari Aviation's original 1994 F.O.I.A. request indicated, the F.A.A. was more concerned with expanding its unilateral and immediate enforcement powers rather than safety in aviation when it planned S.F.A.R. 71.

No discussion of helicopter operations in the State of Hawaii is complete without a brief review of the legally-misguided efforts of the State of Hawaii Department of Transportation to regulate the routes, altitudes and frequency of tour helicopter aircraft. I successfully challenged this efforts [sic] in the early 1990's, prompting a call from Hawaii's congressional delegation for an S.F.A.R. at that time. As the record shows, all the F.A.A. required was a little lead time and a few good accidents; it got both in 1994. The F.A.A.'s legal counsel may have succeeded in blinding the Ninth Circuit Court of Appeals to its false and devious claims of emergency necessity in 1994, but its subsequent inability to provide a meaningful disposition of the post-promulgation comments and its recognition that the national tour rule requires further disposition of those same comments will result in more careful scrutiny during the subsequent legal challenges to the continued vitality of S.F.A.R. 71.

The F.A.A. lacks any valid reason to conduct its deliberations and regulatory development in insolation if it has nothing to hide. The number of affected operators is small, and the F.A.A. could easily meet and obtain the input of all operators before casting its rules in concrete; it has consistently both refused and failed to do so. The Docket in this rulemaking is the tip of the iceberg, and does not contain all of the drafts, redrafts, comments, proposals and decisions the F.A.A. has utilized; any trust

the F.A.A. expects to receive in its regulatory program must be based upon an open rather than a concealed decision-making process.

I am not naive enough to believe that the mere arguments of those directly affected by this governmental conduct will be heard or considered after the last 6 years of regulatory abuse. As long as some people believe in open government and other [sic] believe in consolidation of power, these conflict [sic] will continue. The F.A.A. will never succeed in issuing and adopting a national rule along the lines of S.F.A.R. 71; it only succeeded in Hawaii due to a small number of affected operators, the pressure from a unified political party/congressional delegation, and the outright use of false data. The national rule remains only a future threat while SFAR 71 is a reality which threatens further loss of life on a daily basis.

Thank your [sic] for considering our comments, offered in the spirit of Aloha and safety in aviation. Mahalo nui loa.

David Glenn Bettencourt
Attorney at Law

APPENDIX M

Western-Pacific Region
Honolulu Flight Standards District Office

[LOGO]
U.S. Department
of Transportation

**Federal Aviation
Administration**

Honolulu HI 96819-1845
Telephone: (808) 837-8300
FAX: (808) 837-8389

August 31, 2000

Safari Aviation, Inc.
P.O. Box 1941
Lihue, HI 96766

Gentlemen:

Enclosed is the original and "File Copy" of the new Table of Contents and Paragraph B050 of your Operations Specifications for air tour operations. Similar Operations Specifications are being issued to all FAR 135 air tour operators in Hawaii.

This reissuance is a result of the three fatal air tour accidents, which occurred since June 1998. A significant common element in those accidents was inadvertent flight into instrument meteorological conditions followed by flight into terrain. The change removes all clear of clouds authorizations and creates a "500 foot bubble" around all clouds in Class G airspace. Other changes clarify the operator's responsibility for the training, checking, and conduct of flight operations by air tour pilots.

The changes to the Operations Specifications are summarized below:

1. The clear of clouds authorization is removed for all operators.

2. A Class G airspace restriction of at least 500 feet above, 500 feet below, and 500 feet horizontally from clouds is added.

3. Clarification: Flight visibility is " . . . as defined in the pilot/controller glossary of the Aeronautical Information Manual."

4. Added: "Initial training for each pilot shall include a flight check by a company instructor over all site specific locations," and an entry for *ground and flight* training will be made in each pilot's training record.

5. Added: "The Administrator shall conduct an initial evaluation of a company instructor over all site specific locations prior to him/her conducting SFAR 71 flight checks."

6. Added: "It is the Administrator's intent to revoke . . . SFAR 71 authorization below 1,500 feet for 30 days in the event a company's air tour pilot is charged with any violation of the SFAR 71 authorization. Prior to reinstatement of the SFAR 71 authorization, all company air tour pilots must be retrained on the SFAR 71 provisions and authorizations."

7. Changed: "Flights must remain within 1 mile either side of the centerline of the transition segment."

You are receiving this letter and the new paragraph B050 of the Operations Specifications by FAX. The provisions of the new B050 are effective immediately.

A hard copy of this letter and paragraph B050 are being mailed to you. Please sign both the original and the "File Copy" after item 4 in the signature block and include the date in the appropriate spaces provided. Once signed, you

acknowledge and agree to comply with the operations specifications. Please retain the original and return the "File Copy", as well as the superseded Operations Specifications, to the Honolulu Flight Standards District Office within 10 days of receipt.

Should you have any questions, please call me at (808) 837-8360. I will be absent from the office until September 18, 2000. Until then, please address your questions to your Principal Operations Inspector (POI).

Sincerely,

/s/ Bill Miller
For Don Hamilton
Supervisor, Operations Unit

Enclosure